

## BYU Law Review

---

Volume 2008 | Issue 5

Article 5

---

12-1-2008

# Shibboleths and Ceballos. Eroding Constitutional Rights Through Pseudocommunication

Susan Stuart

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>



Part of the [Civil Rights and Discrimination Commons](#), [Communication Commons](#), and the [Constitutional Law Commons](#)

---

### Recommended Citation

Susan Stuart, *Shibboleths and Ceballos. Eroding Constitutional Rights Through Pseudocommunication*, 2008 BYU L. Rev. 1545 (2008).  
Available at: <https://digitalcommons.law.byu.edu/lawreview/vol2008/iss5/5>

This Article is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

## Shibboleths and *Ceballos*: Eroding Constitutional Rights Through Pseudocommunication

Susan Stuart\*

### ABSTRACT

Recently, the Supreme Court rendered an inexplicable First Amendment decision that has far-reaching effects on the way government is held accountable to the public. In *Garcetti v. Ceballos*, the Court determined that a government employer can retaliate against an employee for doing his job correctly, notwithstanding the Constitution, so long as the employer targets speech that was part of the employee's official duties. Inasmuch as government employees are often responsible for reporting government misconduct and other matters of public concern, this opinion essentially leaves the public unprotected from the unbridled discretion of government supervisors. The possible motivations for this decision are several: the adoption of an increasingly popular management style that marginalizes employees; a free-market theory of governance that deregulates control of management; and, in actuality, the protection of current government supervisors from whistleblowers. All are symptomatic of the Court's increasingly authoritarian tendencies. To make the *Garcetti* decision palatable, the Court majority disguised the fact that its holding was unsupported by the law by employing four basic rhetorical devices throughout the opinion: the Narrative (or Storytelling) voice, the Granfalloon voice, the Symbolic voice, and the Empty voice. All four voices have universal application so that, unfortunately, the *Garcetti* opinion is not an outlier but an instantiation of once and future cases.

"When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."

"The question is," said Alice, "whether you *can* make words mean so many different things."

---

\* Professor of Law, Valparaiso University School of Law. My heartfelt thanks to the superlative editing skills of Kenneth Pike and the staff of the BYU Law Review.

“The question is,” said Humpty Dumpty, “which is to be master—that’s all.”<sup>1</sup>

### I. INTRODUCTION

Humpty Dumpty refers to Lewis Carroll’s poem, *Jabberwocky*,<sup>2</sup> when he suggests that one who speaks is the master of his meaning. In the context of Lewis Carroll’s children’s story, *Jabberwocky* has no meaning, at least that an adult audience could discern. It is nonsensical because, although it contains recognizable words and phrases from the English language (“and,” “the,” “in the”), one gets tangled up in the unfamiliar lexemes, words and word stems like “brillig” and “slith.”<sup>3</sup> Humpty Dumpty, as master of the words, translates some of the unfamiliar words for Alice,<sup>4</sup> but the song still makes no sense.

If one considers a writing court as “master” of the language in its decision, each “master” usually conforms to the jargon familiar to the legal audience. The common linking words may be recognizable to the general public while the lexemes in the opinion are familiar to the members of the trade, who can translate them into fairly simple English for the client. But in recent years, the Supreme Court is becoming more like Humpty Dumpty—master of the legal profession’s jargon, using familiar vocabulary and legal terms of the profession but reaching nonsensical results not otherwise conceived by precedent because the Court is changing the meanings of the

---

1. LEWIS CARROLL, *THROUGH THE LOOKING-GLASS AND WHAT ALICE FOUND THERE* 94 (Random House 1946) (1871).

2. The first stanza of *Jabberwocky* reads:

‘Twas brillig and the slithy toves  
Did gyre and gimble in the wabe:  
All mimsy were the borogoves,  
And the mome raths outgrabe.

*Id.* at 18.

3. YourDictionary.com, *The Collected Works of the Phantom Linguist: But There Are No Such Things as Words!*, <http://www.yourdictionary.com/library/ling005.html> (last visited Nov. 1, 2008).

4. CARROLL, *supra* note 1, at 95–97. A rough rendition of the first stanza of *Jabberwocky* is:

It was evening, and the smooth active badgers  
were scratching and boring holes in the hill side  
the parrots were all unhappy  
and the solemn turtles shrieked.

Sebastian Wren, *Decoding and the Jabberwocky’s Song* 1 (Sw. Educ. Dev. Lab.), <http://www.sedl.org/reading/topics/jabberwocky.pdf> (last visited Nov. 1, 2008).

words. The Court's language makes the result seem palatable and even reasonable, but upon closer scrutiny, the words are really jabberwocky.

*Garcetti v. Ceballos*<sup>5</sup> is one of the more obvious examples of this jabberwocky by which the Court has, once and for all, deprived government employees of First Amendment<sup>6</sup> protections while they are fulfilling their official duties. In trying to "diagnose" the discomfort one experiences when studying the opinion, one jumps from problem to problem, the amalgamation of which is not easily distilled into a particular study of language. However, the intent and purpose of this amalgamation of language problems is perhaps best described as pseudocommunication.

Pseudocommunication is less about the symbolic transmission of the message—although that is ultimately affected—than it is about obfuscating the message and its intentions. Among the purposes of pseudocommunication are control of the message through secret knowledge and the imposition of unquestioned authority and obedience to that authority.<sup>7</sup> Pseudocommunication may employ any number or combination of obfuscatory language choices—mainly deliberate—including doublespeak, euphemism, dysphemism, rhetorical manipulation, and misrepresentation. Pseudocommunication has more to do with cant than with logic and analysis. It is about empty language to cover the absence of honest legal analysis. The majority decision in *Garcetti* exploited four distinct voices of pseudocommunication: the Narrative Voice, the Granfalloon Voice, the Symbolic Voice, and the Empty Voice. The irony in *Garcetti* is that the Court's intent and its message are the same—the imposition of authority. As the opinion approves the imposition of power over public employee speech so also does the opinion caricaturize the imposition of the Court's "master-y" over the language. Thus, *Garcetti* is an allegorical instance of the Court's imposing authoritarian structure over our civil rights through pseudocommunication.<sup>8</sup>

---

5. 547 U.S. 410 (2006).

6. U.S. CONST. amend. I.

7. See Terence P. Moran, *Propaganda as Pseudocommunication*, 36 ET CETERA 181, 190, 193–94 (1979), available at <http://learn-gs.org/library/etc/36-2-moran.pdf>.

8. Remedying the problem may be well-nigh impossible short of submitting arguments to the Court where the parties have agreed on the definitions of the legal terms at issue.

The various techniques of pseudocommunication that the Court used to reach a result that cannot otherwise be rationalized by traditional legal analysis serve as the foundation for this Article's structure. First, Part II of this Article examines the roots of pseudocommunication and its relationships to propaganda and to the law. Part III connects the political roots of pseudocommunication to authoritarian governance, to which the *Garcetti* opinion paid particular homage. Part IV then sets out the infrastructure of the facts and analysis furnished by the majority decision in *Garcetti v. Ceballos* as the basis for further exploration of the devices of pseudocommunication employed by the Court. The next sections explore the four major areas of the Court's pseudocommunication: Narrative Rhetoric, the storytelling function of the Court (Part V); Granfalloon Rhetoric, an "us versus them" political narrative (Part VI); Symbolic Rhetoric, the use of symbols to appeal to particular readers (Part VII); and Empty Rhetoric, the use of cant and doublespeak (Part VIII). Part IX discusses the ramifications of the Court's decision for supporting government efforts to stifle critical speech.

## II. PSEUDOCOMMUNICATION AND THE LAW

Pseudocommunication in the context of this Article is a broad umbrella covering various semantic and rhetorical devices used by lawyers and by courts to persuade others that an unpalatable (and often wrong) result is just and right and good. Here, pseudocommunication does not refer to the lawyer's craft and trade—the use of rhetoric and language to persuade. Instead, pseudocommunication is a mutation of persuasive lawyering into something more insidious: the deliberate manipulation of language under the guise of legal precision to persuade an audience that a gross error in judgment is perfectly acceptable, where all notions of honesty are stripped from the legal purpose by manipulating the tools of the language. In other words, pseudocommunication is the technique of selling a product no one wants, not through persuasive lawyering but through Madison Avenue shilling.

Pseudocommunication has its philosophical roots in propaganda. Indeed, it *is* propaganda. "Propaganda" means the dissemination or

promotion of ideas.<sup>9</sup> There is no denying that the act of advocacy is an act of persuasion akin to propaganda, the skill of image-making and image-projecting.<sup>10</sup> But despite the fact that they may be distant cousins on the same family tree, there is one major distinction between pseudocommunication as propaganda and legal advocacy as persuasion, and that distinction lies in the speaker's purpose relative to the recipient.

On the one hand, persuasion is "a communicative process the purpose of which is to influence."<sup>11</sup> Persuasion relies on the dependency of the persuader on the persuadee in a reciprocal transaction of communication. Persuasion is "a complex, continuing, interactive process in which a sender and a receiver are linked by symbols, verbal and nonverbal, through which the persuader attempts to influence the persuadee to adopt a change in a given attitude or behavior because the persuadee has had perceptions enlarged or changed."<sup>12</sup> This sender-recipient relationship describes the role of the traditional lawyer-advocate: both written and oral communications are aimed at getting the decisionmaker to rule in favor of one side or the other, and the decisionmaker is persuaded as a result of that transactional activity to reach a decision for one side or the other. In a democratic setting, persuasion can be messy and unpredictable, spontaneous and decentralized,<sup>13</sup> but it is not as dishonestly manipulative as propaganda.

Propaganda goes farther than persuasion in influencing the recipient with a much different goal and process; it "is the deliberate and systematic attempt to shape perceptions, manipulate cognitions, and direct behavior to achieve a response that furthers the desired intent of the propagandist."<sup>14</sup> Where persuasion informs, propaganda deceives. "The means may vary from a mild slanting of information to outright deception, but the ends are always predetermined in

---

9. GARTH S. JOWETT & VICTORIA O'DONNELL, PROPAGANDA AND PERSUASION 15 (1986) ("['Propaganda'] is from Latin—'congregation de propaganda fide'—meaning congregation for propagating the faith of the Roman Catholic Church.").

10. Moran, *supra* note 7, at 182.

11. JOWETT & O'DONNELL, *supra* note 9, at 24.

12. *Id.* (quoting VICTORIA O'DONNELL AND JUNE KABLE, PERSUASION: AN INTERACTIVE-DEPENDENCY APPROACH 9 (1982)).

13. See JONATHAN SCHELL, THE TIME OF ILLUSION 371 (1976); Moran, *supra* note 7, at 182.

14. JOWETT & O'DONNELL, *supra* note 9, at 16 (emphasis omitted).

favor of the propagandist.”<sup>15</sup> Persuasion is an effort to address individual psychological behavior whereas propaganda is designed to manipulate societal behavior and its patterns.<sup>16</sup> Jowett and O'Donnell define “propaganda” as the promotion of “a partisan or competitive cause in the best interest of the propagandist but not necessarily in the best interest of the recipient. The recipient, however, may believe that the communication is merely informative.”<sup>17</sup>

Pseudocommunication is a useful, if not the principal, tool of propagandists. The characteristics and purposes of pseudocommunication are:

- 1) The sender maintains control and determines the meaning of the message and limits the effectiveness of feedback.
- 2) The sender's control of the analysis results in the Stated and Observed Purposes being different and often contradictory because the sender's stated purposes are often deliberately hidden, unclear, and not empirically verifiable.
- 3) The sender's control of the analysis as well as the flow of information encourages collective and non-critical thinking by the receiver.
- 4) The sender's symbol system confuses symbols and signs and encourages ambiguous interpretation by implying, without establishing, close relationships between symbols and their referents.
- 5) The sender's appeals make emotional connections between the receiver and the message.
- 6) The sender bases his justification for the message on private and unknowable sources, such as outside authorities, inside information, secret knowledge, and mystical revelation.

---

15. *Id.* at 19–20.

16. *Id.* at 21, 36.

17. *Id.* at 23. Three types of propaganda have been described: *white propaganda* occurs when the source of the propaganda is identified and the message is accurate but the process of communication is designed to enhance the “good-guy” status of the source; *gray propaganda* occurs when the source may or may not be identified and the information may or may not be accurate; and *black propaganda*, also known as disinformation, occurs when the source is false and the information contains lies and deceptions. *Id.* at 17–18. One type of propaganda—white propaganda—even seems informational because the identifiable speaker imparts accurate information. However, white propaganda has a partisan agenda or there would have been no communication. Similar techniques of appearing informative infect gray propaganda (may be accurate) and black propaganda (not accurate). *Id.* at 23.

- 7) The sender believes that the ends justify the means, which are value-free and above criticism.
- 8) The sender analyzes the universe with certainty and reduces that analysis to a simple word, phrase, or slogan.
- 9) The sender encourages the receiver to avoid responsibility because, alternately, the responsibility is someone else's or the receiver is acting on behalf of a higher authority.
- 10) The sender tells the receiver that an outside, evil force is causing disorganization and misunderstanding and that no amount of intelligence will overcome its continually changing tactics.<sup>18</sup>

Pseudocommunication tampers with reality. Consequently, pseudocommunication requires reflecting not only on the symbols used for the communication itself but the context and the structure of the message, which is intended to appeal to emotions rather than to rationality,<sup>19</sup> hence its close affiliation with propaganda.

Not all pseudocommunication is propaganda; pseudocommunication is also the backbone of bureaucratic communications and mass media. But the psychological goal of propaganda is the psychological goal of pseudocommunication—to manipulate reality for the benefit of the speaker. When the government uses pseudocommunication, one remembers Orwell's fictional classic *1984* and the principle of doublethink.<sup>20</sup> Big Brother's doublespeak for converting citizens like Winston Smith to orthodoxy—"war is peace"

18. Moran, *supra* note 7, at 184–95 (referring to all ten characteristics and purposes of pseudocommunication).

19. *Id.* at 182–83.

20. Orwell described doublethink as follows:

*Doublethink* means the power of holding two contradictory beliefs in one's mind simultaneously, and accepting both of them. The Party intellectual knows in which direction his memories must be altered; he therefore knows that he is playing tricks with reality; but by the exercise of *doublethink* he also satisfies himself that reality is not violated. The process has to be conscious, or it would not be carried out with sufficient precision, but it also has to be unconscious, or it would bring with it a feeling of falsity and hence of guilt. . . . To tell deliberate lies while genuinely believing in them, to forget any fact that has become inconvenient, and then, when it becomes necessary again, to draw it back from oblivion for just so long as it is needed to deny the existence of objective reality and all the while to take account of the reality which one denies—all this is indispensably necessary. Even in using the word *doublethink* it is necessary to exercise *doublethink*. For by using the word one admits that one is tampering with reality; by a fresh act of *doublethink* one erases this knowledge; and so on indefinitely, with the lie always one leap ahead of the truth.

GEORGE ORWELL, 1984 214 (Penguin Books 1977) (1949).



and “freedom is slavery”—is the use of pseudocommunication for government purposes.<sup>21</sup> If a court’s decisions are a government function, then pseudocommunication can be its servant as surely as Big Brother’s.

As a necessary component of pseudocommunication, a court opinion is clearly one-sided. Control is in the court as sender, not in the recipients. The recipients, if consulted at all, are being manipulated to a particular mindset dependent upon the language choices and definitions selected by the court. The higher the court, the greater the temptation to use and abuse pseudocommunication. This “imposed system” limits the recipients’ feedback, even assuming that the court would consider feedback. Once the briefs are filed and oral arguments heard, it is the rare court that will respond to a petition for rehearing. Indeed, a court’s opinion is a more natural source of pseudocommunication than other forms of legal communication because a court controls the ultimate message and intends to affect the recipients, including the lawyers and the public. But the increasingly common use of pseudocommunication in current legal discourse is troubling not only for its effect on a particular case but for future cases.<sup>22</sup>

### III. THE POLITICS OF PSEUDOCOMMUNICATION

This aspect of a court’s control over the message is, underlying everything else, the imposition of authority over the audience. The notion is that the sender holds the power and intends to consolidate if not spread that power through the message. Orwell’s *1984*, of course, was an extreme example of pseudocommunication to exert control under the most extreme of governmental formulæ, totalitarianism. Today, pseudocommunication in the name of the law is being deployed increasingly in the name, not of Orwell’s totalitarianism, but of authoritarianism.

“Authoritarianism” has been defined in two ways: “unquestioning obedience to authority” and “obedience combined with the use of authority to repress, punish and oppress human

---

21. See generally Terence P. Moran, *Public Doublespeak: On Communication and Pseudocommunication*, 36 C. ENG. 112 (1974).

22. See generally Judith D. Fischer, *Why George Orwell’s Ideas About Language Still Matter for Lawyers*, 68 MONT. L. REV. 129 (2007).

beings.”<sup>23</sup> The authoritarianism most likely encountered in today’s legal discourse is substantive authoritarianism, which “means opposition to the ‘liberal’ values of tolerance of ambiguity and difference, insistence on obedience to rules, insistence on conformity, and use of coercion and punishment to ensure that obedience.”<sup>24</sup> Such authoritarianism may have no other impetus than “a suspicious and distrustful view of human nature and is frequently linked, both on a personal and political level, to . . . patriarchy [and] oppresses in the name of order and control.”<sup>25</sup>

Authoritarianism is not necessarily bad, insofar as there is a benign authority that demands obedience to a system that safeguards liberty at the expense of minimal loss of personal freedoms.<sup>26</sup> But when the authoritarian system becomes more negative and seeks absolute obedience, it deprives certain freedoms absolutely and employs power to oppress and sanction, tending more toward repressive authoritarianism.<sup>27</sup> These “[a]uthoritarians obey and demand obedience to authority’s commands simply *because* they are commands, and they hold a harshly punitive attitude toward those who do not comply.”<sup>28</sup>

In recent years, “authoritarianism”—in both followers and leaders<sup>29</sup>—has become uncomfortably aligned with conservative political movements, often denoted and studied separately as “right-wing authoritarianism.”<sup>30</sup> Characteristics of right-wing authoritarianism include:

23. Lynne Henderson, *Authoritarianism and the Rule of Law*, 66 IND. L.J. 379, 390 (1991).

24. *Id.* at 382.

25. *Id.*

26. STANLEY MILGRIM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW 179 (2004) (“[T]he problem is not ‘authoritarianism’ as a mode of political organization or a set of psychological attitudes but authority itself. Authoritarianism may give way to democratic practice, but authority itself cannot be eliminated as long as society is to continue in the form we know.”).

27. *See* Henderson, *supra* note 23, at 390–92.

28. *Id.* at 394.

29. BOB ALTEMEYER, THE AUTHORITARIANS 2 (2007), available at <http://www.theauthoritarians.com/>. “Authoritarianism is something authoritarian followers and authoritarian leaders cook up between themselves. It happens when the followers submit too much to the leaders, trust them too much, and give them too much leeway to do whatever they want—which often is something undemocratic, tyrannical and brutal.” *Id.*

30. BOB ALTEMEYER, THE AUTHORITARIAN SPECTER 6 (1996).

- 1) Authoritarian submission—a high degree of submission to the authorities who are perceived to be established and legitimate in the society in which one lives.
- 2) Authoritarian aggression—a general aggressiveness, directed against various persons, that is perceived to be sanctioned by established authorities.
- 3) Conventionalism—a high degree of adherence to the social conventions that are perceived to be endorsed by society and its established authorities.<sup>31</sup>

Leaders of right-wing authoritarian groups tend to exhibit weaker authoritarian characteristics, although they do share certain of their followers' prejudices and conservative economic philosophies.<sup>32</sup> As "social dominators," authoritarian leaders believe less in some cause or creed than in gaining power through any means necessary.<sup>33</sup> And "[w]hen social dominators are in the driver's seat, and right-wing authoritarians stand at their beck and call, unethical things appear much more likely to happen."<sup>34</sup>

Those who embrace authoritarian leaders' messages possess characteristics that make them prone to following social dominators. Specifically, they have difficulty accurately remembering evidence, making correct inferences in critical reasoning, and recognizing false inferences.<sup>35</sup> They are also "suckers for slogans and sayings."<sup>36</sup> They tend to "see the world as a more dangerous place than most others do, with civilization on the verge of collapse and the world of Mad Max looming just beyond" in their over-exaggeration of the importance of social problems.<sup>37</sup> Right-wing authoritarians tend to scrutinize more critically the evidence underlying conclusions with which they disagree than the evidence of principles they want to believe.<sup>38</sup> Such authoritarians also tend to have higher credulity when

---

31. *Id.* Given the voting majority in *Garcetti*—Justices Kennedy (writing), Scalia, Thomas, Roberts, Alito—right-wing authoritarianism seems the more appropriate attribute than liberal authoritarianism. BOB ALTEMEYER, ENEMIES OF FREEDOM: UNDERSTANDING RIGHT-WING AUTHORITARIANISM 230–31 (1988).

32. *See* ALTEMEYER, *supra* note 29, at 162.

33. *Id.* at 170.

34. *Id.* at 176.

35. *See* ALTEMEYER, *supra* note 30, at 94–95.

36. *Id.* at 99.

37. *Id.* at 100.

38. *Id.* at 101.

it comes to making attributions to groups of which they are members than in disbelieving the stereotypes of those groups, thereby making such authoritarians more gullible when a speaker validates their views.<sup>39</sup>

As for their political viewpoints, right-wing authoritarians tend not to embrace “freedom of speech, freedom of opportunity, the right to due process, the principle that no one is above the law, tolerance of others, [and] blind and impartial justice.”<sup>40</sup> Concomitantly, authoritarians tend to agree with statements like: “[t]his country would be better off if we cared less about how equal all people are”; “[s]ome groups of people are simply not the equals of others”; and “[s]ome people are just more worthy than others.”<sup>41</sup> Thus, the current authoritarian strain in the American political landscape has six primary features: 1) a cult of anti-modernism and cultural traditionalism that harkens to the nineteenth century and the robber barons;<sup>42</sup> 2) the diminution of democratic public spaces in direct correlation to the corporatization of civil society;<sup>43</sup> 3) rampant nationalism that weds patriotism with a culture of fear;<sup>44</sup> 4) attempts to control mass media through the coordination of government regulation and corporate cronies;<sup>45</sup> 5) the eradication of the church-state dichotomy simultaneously with the increasing use of religious rhetoric in political dialogue and policy;<sup>46</sup> and 6) the increased use of Orwellian doublespeak as official government language.<sup>47</sup>

Such substantive authoritarianism is infecting the judiciary.<sup>48</sup> Of course, a certain amount of authoritarianism in the judiciary is necessary to “force” people to obey and accept the premise of the rule of law. However, that judicial power can become twisted when it is the servant of substantive authoritarianism rather than merely an authoritarian influence of the social and political power of a

---

39. *See id.* at 111.

40. ALTEMEYER, *supra* note 31, at 273.

41. ALTEMEYER, *supra* note 29, at 160.

42. Henry A. Giroux, *The Emerging Authoritarianism in the United States: Political Culture under the Bush/Cheney Administration*, 14 SYMPLOKE 98, 104 (2006). Giroux calls the current U.S. political authoritarianism “proto-fascism.” *Id.* at 102.

43. *Id.* at 104.

44. *Id.* at 106.

45. *Id.* at 107.

46. *Id.* at 114.

47. *Id.* at 110.

48. *See* Henderson, *supra* note 23, at 434–47.

government.<sup>49</sup> The Supreme Court has been documented specifically as doing its part to carry on this substantive authoritarian tradition:

Rather than being conservative in the sense of caution and respect for tradition, much of the Court's language and many of its decisions provide evidence of a substantively authoritarian attitude on the part of many members of the Court. The Court has variously justified its decisions as deference to state authorities, obedience to legal commands and support of majoritarianism. The Court has also engaged in nativist, suspicious and stereotypical reasoning. Prejudice and punitiveness are frequently subtextual, if not immediately obvious, in the Court's opinions. Along the way, the Court has enhanced the power of government to command, to punish, to control, and to ignore social wrongs. It has also diminished the power of individuals and governments—state and federal—to attempt to correct the evils of subordination and oppression.<sup>50</sup>

One of the instruments designed to make palatable this toxic brew of feigned traditional conservative jurisprudence and increased governmental oppression is not just the Court's viewpoint, but its use of pseudocommunication.

Previously described features of pseudocommunication that serve this substantive authoritarianism include:

- 1) The sender maintains control and determines the meaning of the message and limits the effectiveness of feedback.
- 9) The sender encourages the receiver to avoid responsibility because, alternately, the responsibility is someone else's or the receiver is acting on behalf of a higher authority.
- 10) The sender tells the receiver that an outside, evil force is causing disorganization and misunderstanding and that no amount of intelligence will overcome its continually changing tactics.

---

49. See *id.* at 383. As substantive authoritarianism infects the ordinarily authoritarian nature of the law and perverts it to the goal of "obedience to positive law and rules and takes a punitive or moralistic stance against deviance," it forms a "jurisprudence of dominance and punishment towards those who are different or deviant." *Id.* at 410. An emerging body of scholarship propounds that substantive authoritarianism is a positive good in jurisprudence. Such scholarship "not only emphasizes obedience to law but also manifests distrust of judges, insistence on an absolute severance between concern for positive law and justice, and a singular lack of concern with the continuing oppression of individuals." *Id.* at 411.

50. *Id.* at 435–36 (footnotes omitted).

Obviously, a very thin line divides judicial decision making—a task the Constitution has given in trust to the Court—and imperial exhortation. The trick in making the latter work for the Court is forcing the recipient to believe in the fairness of the decision and not question its sources or its fundamental reasoning. In *Garcetti* (an allegory for other cases), the Court employs pseudocommunication to further its authoritarian intentions under the guise of judicial decision making.

#### IV. *GARCETTI V. CEBALLOS*: THE OPINION

##### *A. The Story According to the Court*

In early 2000, Richard Ceballos was a Deputy District Attorney for the Los Angeles County District Attorney's Office. He worked out of the Pomona branch office as a calendar attorney with responsibilities that included supervising other attorneys in the office, preparing filings in pending cases, and investigating charges.<sup>51</sup> In February, a defense attorney on a pending case notified Ceballos that he had filed a motion to challenge the search warrant—a motion to traverse—because of concerns about inaccuracies in the affidavit underlying that warrant.<sup>52</sup> He also requested that Ceballos review the case, a usual request of calendar deputies.<sup>53</sup>

Ceballos' review of the case gave him pause: he determined that the affiant had made serious misrepresentations.<sup>54</sup> After speaking with the affiant deputy sheriff, Ceballos became particularly concerned about the affidavit's representations that tire tracks were apparent on a particular roadway, the composition of which would have made it virtually impossible for tire tracks to be detected.<sup>55</sup> Concerned enough about the validity of the case to take further action, Ceballos discussed his concerns with Frank Sunstedt (then-Head Deputy District Attorney) and Carol Najera, Ceballos' immediate supervisor.<sup>56</sup> Ceballos then drafted a follow-up

---

51. *Garcetti v. Ceballos*, 547 U.S. 410, 413, 422 (2006).

52. *Id.* at 413–14.

53. *Id.* at 414.

54. *Id.*

55. *Id.*

56. *Id.*; *Ceballos v. Garcetti*, No. CV0011106AHMAJWX, 2002 WL 34098285, at \*1–2 (C.D. Cal. Jan. 30, 2002), *rev'd*, 361 F.3d 1168 (9th Cir. 2004), *rev'd*, 547 U.S. 410 (2006).

memorandum to Sunstedt, expressing his concerns about the case and recommending its dismissal.<sup>57</sup> Drafting such a disposition memorandum was common in Ceballos' job, and Ceballos wrote it pursuant to his duties as a prosecutor.<sup>58</sup> A meeting was then conducted about the affidavit among Ceballos, Sunstedt, Najera, and several representatives of the sheriff's department, including the affiant deputy.<sup>59</sup> Apparently, that meeting grew heated, and one of the sheriff's representatives criticized Ceballos' handling of the matter.<sup>60</sup> Following the meeting, Sunstedt decided to proceed with the prosecution of the case.<sup>61</sup>

The defense counsel called Ceballos to testify at the hearing on the motion to traverse, at which he testified to his concerns about the affidavit.<sup>62</sup> The trial court denied the defense's motion.<sup>63</sup> Thereafter, Ceballos claimed the district attorney's office retaliated against him with various adverse employment actions: reassignment as a trial deputy, transfer to another courthouse, and denial of a promotion.<sup>64</sup> Ceballos filed suit against Gil Garcetti (then-District Attorney of Los Angeles County) in his individual and official capacities, Najera and Sunstedt in their individual capacities, and the County of Los Angeles.<sup>65</sup> Ceballos based his § 1983 cause of action on the defendants' violation of his First and Fourteenth Amendment rights in "the aftermath of these events."<sup>66</sup> Ultimately, Ceballos' memorandum was the only issue that reached the Ninth Circuit, which determined that the First Amendment protected Ceballos' speech as a matter of public concern.<sup>67</sup>

---

57. *Garcetti*, 547 U.S. at 414. Ceballos also apparently submitted a second memorandum reflecting his conversation with the affiant deputy sheriff, but only the Supreme Court noted that memorandum. *Id.*; see Respondent's Brief in Opposition at \*4, *Garcetti*, 547 U.S. 410 (No. 04-473), 2005 WL 190354.

58. *Garcetti*, 547 U.S. at 421.

59. *Id.* at 414.

60. *Id.*

61. *Id.*

62. *Id.* at 414-15.

63. *Id.* at 415.

64. *Id.*

65. *Ceballos v. Garcetti*, 361 F.3d 1168, 1172 (9th Cir. 2004), *rev'd*, 547 U.S. 410 (2006).

66. *Ceballos*, 547 U.S. at 415.

67. *Id.* at 416. The district court granted the defense's motion for summary judgment on the § 1983 First Amendment claim and dismissed the state law claim for intentional infliction of emotional distress. *Ceballos v. Garcetti*, No. CV0011106AHMAJWX, 2002 WL

*B. The Majority's Decision*

In *Garcetti*, the Court essentially asserted that government employees have no First Amendment rights if they speak pursuant to their employment duties.<sup>68</sup> They might be protected if they speak as citizens, but if they speak while engaged in duties imposed by their jobs, they are not protected.<sup>69</sup> The way the majority reached and justified its decision after decades of protecting the First Amendment rights of public employees is a classic example of using pseudocommunication for the benefit of authoritarianism because it expanded the power of government managers to command, control, and punish their employees without regard to the harm such power will inflict on the government function itself.

Justice Kennedy starts the majority decision with the precedential context that gave public employees First Amendment protections, and prefaces that context by expansively noting that public employees do not surrender their First Amendment rights at the gates of their employment office.<sup>70</sup> Rather, the government employee has the right—in certain circumstances—to address matters of public concern in her capacity as a citizen without fear of government retaliation.<sup>71</sup> The majority decision then traced the route that overturned the “dogma . . . that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights.”<sup>72</sup> Beginning with *Pickering v. Board of Education of Township*

---

34098285, at \*7 (C.D. Cal. Jan. 30, 2002), *rev'd*, 361 F.3d 1168 (9th Cir. 2004), *rev'd*, 547 U.S. 410 (2006). The county defendants prevailed on summary judgment under Eleventh Amendment sovereign immunity while the individual defendants prevailed under qualified immunity. *Ceballos*, 361 F.3d at 1172, *rev'd*, 547 U.S. 410 (2006). The United States Court of Appeals for the Ninth Circuit reversed the district court, holding that the county defendants were not covered by the Eleventh Amendment's sovereign immunity because the district attorney and hence his office were acting in a county capacity, a political subdivision of the state. *Id.* at 1170. Furthermore, the individual defendants were not entitled to qualified immunity under the First Amendment because of the public concern addressed by Ceballos' speech and his interest in the speech overbore the interest of the government in the efficient and nondisruptive running of the government office. *Id.* With the memorandum the only matter that the Ninth Circuit addressed, the remainder of Ceballos' speech issues remained for trial. *Id.* at 1172–73.

68. *Garcetti*, 547 U.S. at 421.

69. *Id.* at 423.

70. *See id.* at 417.

71. *Id.*

72. *Id.* (quoting *Connick v. Myers*, 461 U.S. 138, 143 (1983)).



*High School District 205*,<sup>73</sup> the majority traced the balancing act it had created between the interests of the employer government and the constitutional rights of its employees.<sup>74</sup> The *Garcetti* Court then set out the test that had ostensibly arisen from *Pickering* and its progeny that would determine the constitutional protection afforded to government employee speech from government employer retaliation: 1) determine if the employee spoke as a citizen on a matter of public concern; 2) if yes, determine if the government employer was justified in treating the government employee differently from the general public; in other words, was the adverse employment action (or punishment) legally justified.<sup>75</sup> That the government, as employer, has broader powers over its employees than over the general public is immutable, asserted the majority.<sup>76</sup> And citizens who become government employees must necessarily accept this limit to their freedom.<sup>77</sup> This freedom is not as “balanced” as envisioned by *Pickering*, but is under a “significant degree of control [because] without [significant control], there would be little chance for the efficient provision of public services.”<sup>78</sup>

The Court then addressed the counterpoise of the *Pickering* balancing test: the government may not impinge on its employees’ fundamental rights as private citizens. Thus, the majority acknowledged the limitation that the government cannot restrict employees’ speech when they are acting as citizens on matters of public concern unless such speech affects the efficient operation of the job.<sup>79</sup> The majority lauded the efforts of government employees to engage in civic discussion, which is necessary “for informed, vibrant dialogue in a democratic society,”<sup>80</sup> but cautioned that

---

73. *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, at 391 U.S. 563 (1968).

74. *Garcetti*, 547 U.S. at 417. In *Pickering*, it was the “balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.” *Id.* (quoting *Pickering*, 391 U.S. at 568).

75. *Id.* at 418. The policy for differentiating public employees from other citizens “reflect[s] the importance of the relationship between the speaker’s expressions and employment. A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity’s operations.” *Id.*

76. *See id.*

77. *Id.*

78. *Id.*

79. *Id.* at 419.

80. *Id.*

government employees may not “constitutionalize the employee grievance.”<sup>81</sup> From this relatively clear explication of the *Pickering* balancing test, the majority then proceeded to do something radically different to Ceballos than what it did to Marvin Pickering.

Although the First Amendment may protect internal speech and speech that concerns the subject of the government job, “[t]he controlling factor in Ceballos’ case [was] that his expressions were made pursuant to his duties as a calendar deputy.”<sup>82</sup> This fact alone distinguished Ceballos’ case from those in which the First Amendment protects from retaliation: “We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”<sup>83</sup> Ceballos was required to write the memo as part of his official duties; hence, his employer had the right to restrict his speech because that speech was not possible but for his job. Such restriction on speech “does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.”<sup>84</sup> Pickering’s letter to the editor, in contrast, “had no official significance and bore similarities to letters submitted by numerous citizens every day.”<sup>85</sup> Indeed, Justice Kennedy characterized Ceballos’ work-product as government speech, bought and paid for by the government, and therefore a message it had the absolute right to control.<sup>86</sup>

The bewildering lack of legal analysis in *Garcetti* evidences pseudocommunication. The decision really lacks anything else of legal significance. No logical connection with precedent suggests this result, which essentially subordinates speech to the employment status of the speaker.<sup>87</sup> In the absence of legal analysis, one might infer that this decision was implicitly impelled by some of the facts: Ceballos’ memorandum created an uproar in a meeting with the

---

81. *Id.* at 420 (quoting *Connick v. Myers*, 461 U.S. 138, 154 (1983)).

82. *Id.* at 421.

83. *Id.*

84. *Id.* at 421–22.

85. *Id.* at 422.

86. *Id.*

87. Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing and § 1983: A Critique of Garcetti v. Ceballos*, 42 U. RICH. L. REV. 561, 573–75 (2008).

sheriff's department, and therefore its interference with the government function justified his discipline under *Pickering*.<sup>88</sup> That inference would stand if the majority had actually applied the *Pickering* inquiry as to whether Ceballos' memorandum interfered with the efficient operation of the district attorney's office. That inquiry would also stand if the facts were as the Supreme Court decision stated them. The absence of significant legal analysis—even a simplistic analogy to precedent—is pseudocommunication's characteristic (2): the sender's control of the analysis results in the stated and observed purposes being different and often contradictory because the sender's stated purposes are often deliberately hidden, unclear, and not empirically verifiable.

A more thorough examination of the Court's techniques illuminates the substitution of pseudocommunication for legal analysis.

#### V. THE NARRATIVE RHETORIC

Facts and descriptive statements do not need to agree in order to have effective pseudocommunication.<sup>89</sup> Indeed, facts are specifically sacrificed for the message in effective pseudocommunication. In an authoritarian's view, facts must be discarded or manipulated so as to inflate the world's problems into exceedingly dangerous events. Consequently, if one must justify clubbing baby seals over the head, it is better to pretend that one is saving civilization from killer whales by eliminating one of their food sources. That is rather the sort of narrative the majority devised to justify its decision that the First Amendment did not protect Ceballos' acts.

The evidence of any particular case is drawn up in a factual narrative—the court's storytelling function.<sup>90</sup> The facts from the immediate story constitute the “local narrative,”<sup>91</sup> which becomes prominent in the historical continuity of the problem or area of

---

88. *Garcetti*, 547 U.S. at 414–18.

89. Hugh Rank, *Watergate and the Language*, in LANGUAGE AND PUBLIC POLICY 2, 3 (Hugh Rank ed., NCTE 1974) (“The question is not just whether subjects and verbs agree, but whether statements and facts agree.” (quoting Robert Hogan, former Executive Secretary of the National Council of Teachers of English)).

90. Mary Ellen Maatman, *Choosing Words and Creating Worlds: The Supreme Court's Rhetoric and Its Constitutive Effects on Employment Discrimination Law*, 60 U. PITT. L. REV. 1, 7 (1998).

91. David Luban, *Difference Made Legal: The Court and Dr. King*, 87 MICH. L. REV. 2152, 2152 (1989).

law.<sup>92</sup> The narrative is composed of the evidence presented by the parties and is appropriate for the procedural posture before the court: evidence at trial is presented and reviewed in one way while evidence in a motion for summary judgment is presented and weighed in another.

The narrative in *Garcetti* is the context of a motion for summary judgment, a test of the evidence that focuses on the undisputed facts material to the controversy.<sup>93</sup> A court will not grant summary judgment if the dispute of facts is sufficiently “genuine” that a reasonable jury could rule for the nonmovant.<sup>94</sup> A court should not, however, change the focus of what a reasonable jury might do—or even a reasonable court at trial to the bench—by eliminating material undisputed facts entirely. Whether a dispute is genuine is a function of the materiality of the fact. Material facts are those “facts that might affect the outcome of the suit under the governing law [and] properly preclude the entry of summary judgment.”<sup>95</sup> It is possible for different courts to make different determinations of a fact’s material nature. However, it is more than passing strange that the other two courts in the *Garcetti* saga employed a slightly different version of the facts than the Supreme Court.

Generally, the narrative voice a court uses to assemble the evidence in a case is a rhetorical device that selects the facts that will ground a judicial opinion in the progression of law on an issue.<sup>96</sup> This function allows the author to shape the story, especially to convince the audience of the rightness of the ultimate legal conclusion in the case. The vision of the past created by the author should lead ineluctably to a decision that is sensible in the context of the version of the facts cast by the author.<sup>97</sup> Any good advocate knows the power of casting the most favorable light on the facts, indeed “interpreting” the record.<sup>98</sup> However, the *Garcetti* Court did not merely interpret the record, it reinvented the record.

---

92. See generally *id.* at 2152–53 (discussing how the “local narrative” relates to the way in which a case is remembered).

93. FED. R. CIV. P. 56.

94. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (quoting *First Nat’l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253 (1968)).

95. *Id.*

96. Maatman, *supra* note 90, at 8.

97. Luban, *supra* note 91, at 2153–54; Maatman, *supra* note 90, at 7.

98. Luban, *supra* note 91, at 2155.

The chief mechanism by which the majority's decision engaged in pseudocommunication and thereby controlled the message was through omission—a "language problem . . . [that is] a more subtle kind of lying and deception than the 'active' aggressive untruths we normally recognize as lies."<sup>99</sup> Such rhetorical device is one of several employed for strategic reasons, such as "strategies of silence, the tactics of omission, evasion, diversion, circumlocution."<sup>100</sup> These devices are deliberately used and intended to persuade, even manipulate, the audience into believing certain stories and analyses. The majority omitted material facts that, if included in the opinion, would have at least made the opinion less persuasive.<sup>101</sup> At most, the omitted facts expose the decision as illogical.

While the Court is entitled to include background facts not material to the decision in order to persuade its audience, there is a limit to this freedom. A summary judgment is adjudged by reviewing the facts most favorable to the nonmovant.<sup>102</sup> When a court omits those undisputed, material facts, it has transformed from persuader of the audience to the de facto advocate for the movant. Thus, its decisions go from persuasion to pseudocommunication, influenced by pseudocommunication characteristic number (7) where the sender believes that the ends justify the means, which are value-free and above criticism.

The majority's selective use of the undisputed facts was, in large measure, driven by its need to justify its new constitutional principle of depriving government employees their First Amendment rights. Without factual justification, the majority would not have been able to persuade its audience of the rationality of the decision. In so doing, the Court heeded the third and fifth characteristics of pseudocommunication: (3) the sender's control of the analysis as well as the flow of information encourages collective and non-critical thinking by the receiver; and (5) appeals are directed toward the emotional, with an emphasis on finding emotional connections between the receiver and the message. So long as the majority's facts can justify viewing Ceballos as a troublesome, or even bad,

---

99. Rank, *supra* note 89, at 4.

100. *Id.* at 10.

101. See generally Robert Batey, Parker v. Levy: *A Primer on Judicial Persuasion*, 49 J. LEGAL EDUC. 97, 99–103 (1999). This essay examined Justice Rehnquist's "manipulation of [the] facts to inculcate support for his side of the argument" in a particular opinion. *Id.* at 98.

102. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

government employee, then the majority's decision is emotionally justified.<sup>103</sup>

Notwithstanding its power to persuade through the narrative voice, the majority's manipulation of the undisputed facts transgressed both the Federal Rules of Civil Procedure and the Court's own proposition that the substantive law governs the materiality and relevancy of the facts in a motion for summary judgment.<sup>104</sup> These rules and precedent do not suggest that the Court itself determines the materiality and relevancy of such facts for some other, political purpose. Several undisputed facts, omitted from *Garcetti* and most favorable to the non-movant, would have told a different story wholly unsympathetic to the government and to the Court's ruling. Extrapolating those omitted, undisputed facts into the bleak narrative voice in Part IV above creates a different narrative voice:

In early 2000, Richard Ceballos was a deputy district attorney for the State of California, working for Gil Garcetti, District Attorney for Los Angeles County. He worked out of the Pomona branch office as a calendar attorney with responsibilities that included supervising other attorneys in the office, preparing filings in pending cases, and investigating charges. In February, a defense attorney on a pending case notified Ceballos that he had filed a motion to challenge the search warrant—a motion to traverse—in the case because of concerns about inaccuracies in the affidavit underlying that warrant. He also requested that Ceballos review the case, not an unusual request of calendar deputies.

Ceballos' review of the case gave him pause: he determined that the affiant had made serious misrepresentations. After *a thorough investigation that included a visit to the crime scene*<sup>105</sup> and speaking with the affiant deputy sheriff, Ceballos became particularly concerned about the affidavit's representations that tire tracks were apparent on a particular roadway, the composition of which would have made it virtually impossible for tire tracks to be detected. *At a minimum, Ceballos determined that the arresting deputies had grossly*

---

103. But the Court's characterization also had to be benign enough so that thousands upon thousands of government employees—troublesome or not—would forfeit important constitutional rights merely by being employed by the government.

104. *Cf. Liberty Lobby*, 477 U.S. at 248.

105. *Ceballos v. Garcetti*, No. CV0011106AHMAJWX, 2002 WL 34098285, at \*1 (C.D. Cal. Jan. 30, 2002), *rev'd*, 361 F.3d 1168 (9th Cir. 2004), *rev'd*, 547 U.S. 410 (2006).

*misrepresented the truth.*<sup>106</sup> *This misrepresentation was particularly vexing in the context of the scrutiny for serious misconduct under which southern California law enforcement agencies were operating at the time.*<sup>107</sup>

Concerned enough about the validity of the case to take further action, Ceballos discussed his concerns with Frank Sunstedt (then-Head Deputy District Attorney) and Carol Najera, Ceballos' immediate supervisor. *"Everyone agreed that the validity of the warrant was questionable."*<sup>108</sup> Ceballos then drafted a follow-up memorandum to Sunstedt, expressing his concerns about the case and recommending its dismissal. Drafting such a disposition memorandum was common in Ceballos' job, and Ceballos wrote it pursuant to his duties as a prosecutor. *Sunstedt was concerned about the accusatory tone of the memo and instructed Ceballos to revise it; Ceballos did so.*<sup>109</sup> A meeting was then conducted about the affidavit among Ceballos, Sunstedt, Najera, and several representatives of the sheriff's department, including the affiant deputy. Apparently, that meeting grew heated, and one of the sheriff's department representatives present criticized Ceballos' handling of the matter. As a consequence of the meeting, Sunstedt decided to proceed with the prosecution of the case.

*After Sunstedt's decision to proceed with the prosecution, Ceballos advised defense counsel of his concerns that certain statements in the warrant's affidavit were false. Defense counsel subpoenaed Ceballos. Ceballos informed Najera that he was obligated to turn over his memorandum to the defense.*<sup>110</sup> *Indeed, all parties involved in the*

---

106. *Id.*

107. *Id.* at \*5.

For reasons that need not be recited—the code word Rampart says it all—there can be no doubt that, in Southern California, police misconduct is a matter of great political and social concern to the community. In recent years, various local law enforcement agencies have been severely criticized for what many believe to be serious misconduct on the part of police officers.

*Id.*; see also *id.* at \*6. "Rampart" refers to a division of the Los Angeles Police Department, so synonymous with police corruption and civil rights violations that, in 2000, the United States Department of Justice agreed to drop a civil rights lawsuit against the City and the Department after they consented to federal oversight. See, e.g., PBS Frontline, Rampart Scandal Timeline, <http://www.pbs.org/wgbh/pages/frontline/shows/lapd/scandal/cron.html> (last visited Nov. 1, 2007).

108. Ceballos v. Garcetti, 361 F.3d 1168, 1171 (9th Cir. 2004); Ceballos, 2002 WL 34098285, at \*1.

109. Ceballos, 361 F.3d at 1171; Ceballos, 2002 WL 34098285, at \*1.

110. Ceballos, 361 F.3d at 1171. Ceballos cited to *Brady v. Maryland*, 373 U.S. 83 (1963), when advising his supervisor that he was obligated to turn over his memorandum to

*Ceballos case conceded that “prosecutors have a duty to disclose information favorable to an accused, including information relating to a witness’s veracity and integrity.”*<sup>111</sup> The defense counsel in the case called Ceballos to testify at the hearing on the motion to traverse, at which he testified to his concerns about the affidavit. The trial court denied the defense’s motion.

Thereafter, Ceballos claimed the district attorney’s office retaliated against him with various adverse employment actions: reassignment as a trial deputy, transfer to another courthouse, and denial of a promotion; *Najera threatened him when he advised her that he would testify truthfully at the hearing on the motion to traverse; his superiors afforded him the “silent” treatment or downright hostility; and his pending murder case was reassigned to a less-experienced deputy while he was barred from handling any future murder cases.*<sup>112</sup> Ceballos filed suit against Gil Garcetti (then-district attorney) in his individual and official capacity, Najera and Sunstedt in their individual capacities, and the County of Los Angeles. Ceballos based his § 1983 cause of action on the defendants’ violation of his First and Fourteenth Amendments in “the aftermath of these events,” *specifically for his submission of the disposition memorandum, his reporting and discussion of his concerns about the deputy sheriff’s misrepresentations, and his testimony at the hearing on the motion to traverse.*<sup>113</sup>

In contrast with the Supreme Court, the narrative voices of both the district court and the Ninth Circuit did not evade the fact that Ceballos had cooperated with his supervisors in all ways and had followed their advice in toning down his original memorandum. Those narrative voices also implied that Garcetti’s office was more sensitive to its working relationship with the sheriff’s department than it was to its ethical obligations: the material facts most favorable to Ceballos, but omitted by the Supreme Court majority, reveal that

---

the defense. *Id.* “We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Brady*, 373 U.S. at 87. Model Rule of Professional Conduct 3.8(d) states: “The prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense . . . .” MODEL RULES OF PROF’L CONDUCT R. 3.8 (2002).

111. *Ceballos*, 361 F.3d at 1179.

112. *Id.* at 1171–72.

113. *Id.* at 1171; Respondent’s Brief in Opposition at \*1, *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (No. 04-473), 2005 WL 190354.



not only was Ceballos required by his job to write the disposition memo that the warrant's affidavit was questionable, but his superiors agreed with the memo's assessment. When one supervisor expressed concern about the memo's accusatory tenor, Ceballos revised it. Representatives of the sheriff's department criticized Ceballos' handling of the matter, but under no version of the facts—the Supreme Court's included—is there any intimation that the *memo* was the cause *célèbre* at that meeting or that it was even discussed.<sup>114</sup>

The *Garcetti* majority clearly played with the facts that favored Ceballos. The *Garcetti* majority had no difficulty in determining that Ceballos' memo was the incendiary agent that took his superiors by surprise: "It demanded the attention of his supervisors and led to a heated meeting with employees from the sheriff's department. If Ceballos' superiors thought his memo was inflammatory or misguided, they had the authority to take proper corrective action."<sup>115</sup> Inasmuch as the undisputed version of the facts could lead to the equally likely inference that Ceballos' supervisors acted childishly, the majority was clearly manipulating the facts. Although Ceballos was a government employee who had created a proper and correct document under proper supervision and during the course of his official work duties, his employer retaliated. Following a different narrative voice than the lower courts, the Supreme Court engaged in pseudocommunication in its narrative voice to justify that retaliation by glossing facts and inferences so that the recipient would accept the unpalatable conclusion.

---

114. The subject of the memo clearly was discussed at the meeting among district attorney representatives and sheriff's department representatives, but there is nothing to suggest that the memo itself was the cause of the meeting's becoming heated. Indeed, why would the sheriff's department be in the least bit interested in a disposition motion written in the course of a deputy district attorney's job? The more likely inference a rational southern California jury would have reached would have undercut the majority's actual conclusion that Ceballos deserved punishment: the meeting was bound to become heated because of the subject matter of the memo, prompted by the pressure that law enforcement agencies in Los Angeles County were experiencing because of official misconduct. See PBS Frontline, *supra* note 107.

115. *Garcetti*, 547 U.S. at 422. Untangling the disposition memo from the remainder of Ceballos' speech claims—including his reporting and discussion of the affidavit and his testimony at the hearing on the motion to traverse—is somewhat problematic under any version of the facts. The memo reached the Court; the other allegations did not. So the majority was required to throw its entire First Amendment analysis into what was an otherwise innocuous part of this government lawyer's job.

Manipulating the facts works not only to make the story congruent with an unpalatable decision, but also to expand the sweep of the holding and the opinion's precedential effect over other government employees. The majority's painting an evocative picture of a bumbling government lawyer with long-suffering supervisors would certainly fulfill a certain audience's notion of government employees in general.<sup>116</sup> Although fitting Ceballos into this stereotype is "an endorsement that is not necessarily grounded in evidence,"<sup>117</sup> it is part of a judicial rhetoric used to sustain a particular outcome.<sup>118</sup> In *Garcetti*, the outcome is rooted in the authoritarian notion that government employees are not worthy of constitutional protection.<sup>119</sup> The judicial rhetoric inducing that conclusion is "manipulative, selfish, [and] goal-oriented,"<sup>120</sup> and thereby manifests classic characteristics of pseudocommunication. If the standard of review is to determine what a rational jury would be persuaded by, then the omission of persuasive background facts in favor of highlighting only those that agree with a particular political ideology demonstrates that the majority deliberately distorted its narrative voice from persuasion to propaganda.

#### VI. THE GRANFALLOON RHETORIC

Shaping the facts through the narrative voice is but one part of any judicial opinion. A court's legal analysis—the "political narrative"—is paired with the chosen local narrative and derives from

---

116. Cf. Lisa R. Pruitt, *Rural Rhetoric*, 39 CONN. L. REV. 159, 166–67 (2006) (discussing how judges evoke certain images of rural people and their lives in their opinions).

117. *Id.* at 172.

118. *Id.* at 166.

119. In addition, this type of judicial rhetoric, as socially constitutive communication, is designed to reach a specific community of recipients—other authoritarians, especially those with power—if not necessarily all the recipients. See James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 690 (1985).

120. *Id.* at 697. Perhaps the Court should not be persuasive when it writes its facts. If rhetorical devices are tools to decide disputes or disagreements, Rank, *supra* note 89, at 8, perhaps they should not be used in judicial opinions for legal matters in which neither exists, such as undisputed facts underlying motions of summary judgment. If the omission of undisputed facts is a falsehood wielded by the power of the bench rather than a persuasive device used by a trusted voice, then writing judicial opinions is no longer "a process of clarification characterized by candor." JOSEPH GOLDSTEIN, *THE INTELLIGIBLE CONSTITUTION: THE SUPREME COURT'S OBLIGATION TO MAINTAIN THE CONSTITUTION AS SOMETHING WE THE PEOPLE CAN UNDERSTAND* 40 (Oxford U. Press 1992). Instead, it becomes a "process of obfuscation characterized by disingenuousness." *Id.*

the selected precedent or statutory analysis. Creating that political tradition and following a particular continuum has a powerful transformative effect on the dialogue in any particular area of law. Thus, the effects of a particular political persuasion have a very significant impact on the rhetoric that comprises legal analysis.<sup>121</sup> Consequently, a court becomes one of the sources for “provid[ing] and perpetuat[ing] the stories that lawyers need and use to make sense of the world. In a sense, these texts shape our sense of ‘pattern recognition.’”<sup>122</sup> As a consequence, a court affects an area of law by not only its selectively imparted local narrative of the facts, but also by the political narrative of the law as it is eventually constituted. Through this political narrative, the community voice may be heard—that voice by which the author communicates with his communal readers or recipients.<sup>123</sup>

This community voice must appeal to those communal recipients through its instrumental use of language:

This means that one person engages another in an exchange of symbols to accomplish some goal. It is not communication for communication’s sake. Rhetoric is communication that attempts to coordinate social action. For this reason, rhetorical communication is explicitly pragmatic. Its goal is to influence human choices on specific matters that require immediate attention. Such communication is designed to achieve desired consequences in the relative short run.<sup>124</sup>

In *Garcetti*, the specific community that the court references consists of the lawyers in the case, other judges who will be responsible for applying the case’s rule of law in the future, and similar legal audiences like law professors, Congress, reporters, and state legislatures.<sup>125</sup> Moreover, the Court, invested as it is with the

---

121. See, e.g., JAMES BOYD WHITE, HERACLES’ BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 34–35 (1985); Luban, *supra* note 91, at 2152, 2155; Maatman, *supra* note 90, at 12.

122. Maatman, *supra* note 90, at 12.

123. *Id.* at 8.

124. GERALD A. HAUSER, INTRODUCTION TO RHETORICAL THEORY 2–3 (Harper & Row 1986); Elizabeth Fajans & Mary R. Falk, *Shooting from the Lip*: United States v. Dickerson, *Role [Im]morality, and the Ethics of Legal Rhetoric*, 23 U. HAW. L. REV. 1, 13 (2000).

125. Sanford Levinson, *The Rhetoric of the Judicial Opinion*, in LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW 199 (Peter Brooks & Paul Gewirtz eds., Yale Univ. Press 1996). However, the entire audience of a Supreme Court opinion by the “power”

ultimate power to convey messages to this particular audience, is in a position to manipulate that political narrative through pseudo-communication.<sup>126</sup>

The majority of the Court, in vocalizing this politico-communal voice in *Garcetti*, adopted Granfalloo<sup>127</sup> rhetoric, a rhetoric that creates both an in-group and an out-group in the audience. In granfalloo rhetoric, the community being addressed is reminded that “[i]f you want to be a chosen one, then you must act like a chosen one.”<sup>128</sup> This rhetoric harmonizes with authoritarianism and reflects a history of a “dominant” culture—here, corporate employers, usually white and male—which displaces the function of legal reasoning in supplying the rhetoric to justify a particular decision.<sup>129</sup> In *Garcetti*, the majority’s political narrative included not just a legal analysis but imposed a cultural language. This language generated traction as far back as *Pickering* and gained impetus as the character of the Court changed with new conservative appointments. The Court achieved this effect not by legal analysis but by cultural and social analysis passing as legal analysis. The legal analysis clearly asserts that government employees have no First Amendment rights, but the rationale for this legal analysis suggests that the historical continuity of this area of law is at an end, the story is already told and a particular plaintiff cannot win. In this regard, the rhetoric is more emotive than rational in supplying the reasoning for a particular result.<sup>130</sup> Such rhetoric smacks of manipulation not by law

---

invested in it remains We the People, a “requisite to a government by consent.” GOLDSTEIN, *supra* note 120, at 19.

126. Levinson, *supra* note 125, at 194–95.

127. “Granfalloo” was coined by Kurt Vonnegut and means “proud and meaningless associations of human beings.” ANTHONY R. PRATKANIS & ELLIOT ARONSON, *AGE OF PROPAGANDA: THE EVERYDAY USE AND ABUSE OF PERSUASION* 168 (W.H. Freeman & Co. 1992).

128. *Id.* at 243. The cognitive aspect of a granfalloo divides into groups to make sense of the world while the motivational aspect creates the belonging suggested by membership in a group. *Id.* at 168–69.

129. For example, Professor Maatman suggests that the Supreme Court’s legitimization of the legal view that racism and discrimination are rare has seeped through to the lower courts in a world view that now suggests the legal equivalence of legislative history, that white popular opinion has a legally constitutive effect on decisions under Title VII. Maatman, *supra* note 90, at 54–62. In the process, “losers endure not only the material burdens of defeat, but also the ignominy of helplessly witnessing their own past edited, their own voices silenced in the attempt to tell the past.” Luban, *supra* note 91, at 2155.

130. See Andrea McArdle, *Teaching Writing in Clinical, Lawyering, and Legal Writing Courses: Negotiating Professional and Personal Voice*, 12 CLINICAL L. REV. 501, 508–09

but by political forces, which is described in characteristic (5) of pseudocommunication: Appeals used are directed toward the emotional, with an emphasis on finding emotional connections between the receiver and the message, thereby fulfilling the goals of the granfalloon.<sup>131</sup>

The corporate granfalloon adopted in the majority's legal rationale started modestly in its citation to a couple of cases. Indeed, the opinion started out as if it were a lawyer's granfalloon, with that specific audience in mind. The citations to precedent in the political narrative were "proof" that the *Garcetti* opinion was a piece of the historical continuity of government employee First Amendment protections so as to persuade the audience of the reasonableness of the outcome, that is, that the government can punish a government employee who is doing his job. While giving lip-service to the historical narrative that "informed, vibrant dialogue" is essential to a democratic society, the majority observed that the community would be deprived of informed opinions if public employees were not allowed to speak on matters of public concern about their employer.<sup>132</sup> The majority then went off the rails by unmasking its lawyer's granfalloon as the corporate granfalloon, addressing an even more exclusive audience of readers.

In accordance with the mindset of the corporate granfalloon, once Ceballos accepted a job with the Los Angeles County District Attorney's office, he was no longer a citizen. Each task of the job he performed was not performed as a citizen but as an employee and consequently subject to evaluation.<sup>133</sup> Although government employees retain the right to engage in civic discourse as citizens, "[t]his prospect of protection . . . does not invest them with a right to perform their jobs however they see fit."<sup>134</sup> An unnamed

---

(2006); see generally Laura Krugman Ray, *Judicial Personality: Rhetoric and Emotion in Supreme Court Opinions*, 59 WASH. & LEE L. REV. 193 (2002).

131. This would seem contrary to what one would view as the main focus of the legal rhetor, the arguments based on logic. See Michael Frost, *Introduction to Classical Legal Rhetoric: A Lost Heritage*, 8 S. CAL. INTERDISC. L.J. 613, 619 (1999). If logos is premised on rhetorical syllogisms (enthymeme) that present the "good reasons" for the audience to be persuaded by the speaker's argument, HAUSER, *supra* note 124, at 75–76, then propaganda shortcuts the need for the logos because there is no "good reason" supported by a rhetorical syllogism in propaganda. It is completely one-sided without the need for the audience to supply the unexpressed portion of the syllogism.

132. *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006).

133. *Id.* at 421.

134. *Id.* at 422.

precedent, according to the Court, endowed government employers with the discretion to manage their “operations,” requiring “heightened interest[] in controlling speech made by an employee in his or her professional capacity. Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees’ official communications are accurate, demonstrate sound judgment, and promote the employer’s mission.”<sup>135</sup> The government employer may control employee speech because the employer paid for the speech itself.<sup>136</sup> Ceballos’ disposition memorandum was a case in point: “It demanded the attention of his supervisors and led to a heated meeting with employees from the sheriff’s department. If Ceballos’ superiors thought his memo was inflammatory or misguided, they had the authority to take proper corrective action.”<sup>137</sup>

The majority was quick to point out that its holding was not intended to denigrate the importance of reporting government misconduct and inefficiency. These remain very real concerns, and “public employers should, ‘as a matter of good judgment,’ be ‘receptive to constructive criticism offered by their employees.’”<sup>138</sup> Indeed, the “powerful network of legislative enactments—such as whistle-blower protection laws and labor codes”—exists to protect those employees who expose misconduct and inefficiency.<sup>139</sup> Furthermore, the majority acknowledged that government attorneys must follow ethical rules and constitutional guidelines, thereby protecting those government attorneys from interference by government employers.<sup>140</sup>

We reject, however, the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties. Our [unnamed] precedents do not support the

---

135. *Id.* at 422–23.

136. *Id.* at 422 (“It simply reflects the exercise of employer control over what the employer itself has commissioned or created.”) (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995)).

137. *Id.* at 423. The majority’s justification is that “[p]roper application of our [unnamed and unexamined] precedents . . . leads to the conclusion that the First Amendment does not prohibit managerial discipline based on an employee’s expressions made pursuant to official responsibilities.” *Id.* at 424.

138. *Id.* at 425 (quoting *Connick v. Myers*, 461 U.S. 138, 149 (1983)).

139. *Id.*

140. *Id.* at 425–26.

existence of a constitutional cause of action behind every statement a public employee makes in the course of doing his or her job.<sup>141</sup>

This analysis is the sum total of the *Garcetti* Court's rationale. The common thread here, unwoven as it is from any case precedent or historical continuity recognized by lawyers, is clearly intended to communicate to the corporate granfalloon that the Court is a member of "their" group and warmly supports their interests.

The majority continued in this corporate political narrative to counter the Ninth Circuit's decision in *Ceballos*' favor, averring that such a holding would

commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business. This displacement of managerial discretion by judicial supervision finds no support in our precedents.<sup>142</sup>

Cloaking this strawman in the armor of corporate granfalloonery probably shielded the majority from the irony of the absence of precedential support for its own holding.<sup>143</sup>

---

141. *Id.* at 426.

142. *Id.* at 423.

143. The majority decision particularly criticized the Ninth Circuit's concerns about the contradictions inherent in punishing official-duty speech but not public speech when the Court of Appeals observed that:

The proposed per se rule would be particularly detrimental to whistle blowers, such as *Ceballos*, who report official misconduct up the chain of command, because all public employees have a duty to notify their supervisors about any wrongful conduct of which they become aware. To deprive public employees of constitutional protection when they fulfill this employment obligation, while affording them protection if they bypass their supervisors and take their tales, for profit or otherwise, directly to a scandal sheet or to an internet political smut purveyor defies sound reason.

*Ceballos v. Garcetti*, 361 F.3d 1168, 1176 (9th Cir. 2004). The Court did not view this as a doctrinal anomaly because the types of speech are distinct: all citizens enjoy speech rights for public expressions. Those citizens, however, who are also government employees have a bit less First Amendment protection than private citizens in their public expressions, such as writing letters to the editors. When they are working, public employees are noncitizens.

This new category of noncitizens concocted by the Court—government employees speaking in their official duties—is analogous to and therefore subject to the same punishments as private employees. Therefore, as the Court implies, the Ninth Circuit was looking at the wrong syllogism because this decision would only affect those employees acting in their official responsibilities, not to their statements made outside the duties of their employment. Instead, government employers could adopt policies of prior restraint:

A public employer that wishes to encourage its employees to voice concerns privately retains the option of instituting internal policies and procedures that are

In addition to its underlying rationale, the majority opinion clarified two points in closing. First, because the Court was bound by the fact that Ceballos' memo was drafted pursuant to his official duties, the majority had no cause to set out a comprehensive framework by which future courts could define the scope of any employee's duties.<sup>144</sup> The second clarifying point was to assure that this decision would not undercut academic freedom because that was not included in the question before the Court.<sup>145</sup> These points were designed to assuage the blistering dissents, especially Justice Souter's, which tried to maintain a vestige of the lawyer granfalloon by attacking the underpinnings of the majority's corporate analysis.

The dissents, on the other hand, were couched in the methodology of legal analysis, distinct from and at cross-purposes with the corporate granfalloonery of the majority. The first dissent, Justice Stevens', hit most succinctly the error in legal analysis in the decision: this holding adds an anomalous and unnecessary inquiry into the government employee's job duties to determine whether her speech is protected.<sup>146</sup>

On the other hand, Justice Souter's dissent—joined by Justices Stevens and Ginsberg—made three major points. First, although Justice Souter agreed that the government has significant interests in making sure its employees do their jobs properly and honestly, the majority went too far in its leap from the *Connick-Pickering* paradigm when a government employee may be disciplined for on-the-job complaints about his or her own employment.<sup>147</sup> Instead, the

---

receptive to employee criticism. Giving employees an internal forum for their speech will discourage them from concluding that the safest avenue of expression is to state their views in public.

*Garcetti*, 547 U.S. at 424.

144. The majority opinion did warn that government employers could not create overly broad job descriptions that would cover all employee speech. The inquiry would be a practical one, an ad hoc evaluation not confined to formal written job descriptions because they may be either too broad or too narrow. *Id.* at 424–25.

145. *Id.* at 425. Specifically, the Court stated:

There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.

*Id.*

146. *Id.* at 427 (Stevens, J., dissenting).

147. *Id.* at 428 (Souter, J., dissenting); *Connick v. Myers*, 461 U.S. 137 (1983).



*Pickering* balancing test—which the majority abandoned altogether—is the rule of law best suited to weigh the value of the employee’s speech against the interest of the government in providing services.<sup>148</sup> Second, Justice Souter bristled at the majority’s characterization that, if the government “pays” for the speech, then it has the right to absolute control because such characterization would imperil academic freedom in public colleges and universities.<sup>149</sup> Last, Souter derided the majority’s reliance on whistleblower statutes to provide sufficient cover for government employees as justification because the definitions of whistleblowers in the different jurisdictions’ statutes might not cover all employee speech nor all employees as the First Amendment’s blanket prohibition would.<sup>150</sup>

Justice Breyer’s dissent echoed these concerns; however, he would not circumscribe acceptable employee speech to official misconduct and health and safety concerns as Justice Souter might. For Justice Breyer, the *Pickering* balancing test remains the most effective way of balancing the justified disclosure of matters of public concern and the government’s interest in the functioning of the workplace.<sup>151</sup> Indeed, he focused on the “public concern” aspect of the balancing test: “There are . . . far too many issues of public concern, even if defined as ‘matters of unusual importance,’ for [Justice Souter’s] screen to screen out very much. Government administration typically involves matters of public concern. Why else would government be involved?”<sup>152</sup> But the dissenting Justices, posing questions of legal analysis and logic, wasted their efforts

---

148. When an employee, during the course of her job, is “speaking as a citizen, that is, with a citizen’s interest, [she] is protected from reprisal unless the statements are too damaging to the government’s capacity to conduct public business to be justified by an individual or public benefit thought to flow from the statements.” *Garcetti*, 547 U.S. at 428. Justice Souter argued that, at the very least, protected employee speech could be carved out for those instances when the employee is speaking about official misconduct, unlawful government behavior, and threats to health and safety. *Id.* at 435. He also pointed out that the circuit courts of appeals that had used this expanded balancing test had not experienced a flood of litigation as opined by the majority, citing an average of approximately 170 cases per year in the circuit and district courts. *Id.* at 435–36. Ironically, during the first year after *Garcetti*, approximately 280 cases flooded the courts on this government employee speech issue, and the tide does not appear to be receding.

149. *Id.* at 438–39.

150. *Id.* at 439–40.

151. *Id.* at 444–49 (Breyer, J., dissenting).

152. *Id.* at 448.

trying to persuade their peers to abandon the corporate granfalloon in favor of the wider legal audience.

The corporate nature of this community voice employed and its pseudocommunication characteristics are apparent throughout the majority opinion in its effort to convert the legal audience to its authoritarian model. First, its exhortations to the audience are to “emulate some unnamed and . . . perhaps questionable group who ‘carry on the important affairs of the world.’”<sup>153</sup> That exhortation is that government employers are unchallengeable in matters of “managerial discretion” and “discipline” of employees’ speech, a trait of the authoritarian nature. Second, the opinion is rife with the idealization of the corporate model of government. There is little doubt that the majority is politically aligned with the continuing battle to corporatize, if not privatize, government. The community is now to believe that managers are patient and kind and concerned about the quality of work of its employees when, in reality, these managers have deficient management skills.<sup>154</sup> It is the thin-skinned supervisor who so often gets caught up in these First Amendment cases in the first place.<sup>155</sup> The majority would have the audience trust government managers but mistrust government employees, elevating managers to authoritarian omnipotence. Last, and perhaps most important for the authoritarian message, is the fear this decision instills in government employees contrary to all notions of good corporate management:

Call it consensus, competition, no-nonsense management, whatever you like. Call it by any label you wish, but if the operation is launched from a springboard of fear, it will produce creative paralysis, incompetence, goal-defeating vindictiveness, and worse. As mountains of evidence demonstrate, when skin preservation comes first, other considerations—including organizational goals—get brushed aside in the hectic fight for survival.<sup>156</sup>

---

153. Moran, *supra* note 21, at 116.

154. “Supervisors and managers are human. To avoid the perception of unfairness, however, it’s important that supervisors exercise self-control. A supervisor should never act or make a decision out of anger . . . .” ANNE H. WILLIAMS, *KNOW YOUR RESPONSIBILITIES: ETHICS & FIDUCIARY DUTIES FOR HR 5* (M. Lee Smith Publishers 2004).

155. *See, e.g.*, Rankin v. McPherson, 483 U.S. 378 (1987).

156. RAYMOND DREYFACK, *SURE FAIL: THE ART OF MISMANAGEMENT* 96 (William Morrow & Co. 1976).

The majority relied on business practices to rationalize its decision, but one would be hard pressed to find any authority on corporate human resources that would suggest that the way to run an efficient corporation is to punish the employee who is doing his job properly.<sup>157</sup> In the manner of all good pseudocommunication, the majority's stated and intended purposes are contradictory.

Perhaps the Court's problem is that smart, but inexperienced, law clerks are now the primary authors of its decisions.<sup>158</sup> As a consequence, the Justices themselves are distanced from the opinion-writing process and feel less ownership of the product. Unfortunately, these smart but inexperienced lawyers are not just "framing" the doctrine,<sup>159</sup> they are shaping that doctrine in the language they use and the rhetorical devices on which they rely to get a political point across. No doubt such authorship responsibility affects the community voice of the majority.<sup>160</sup> And when the community voice is distorted, weak legal analysis ensues.

Hiding weak legal analysis by pseudocommunication is the point and is nowhere more evident than in the majority's rationale in *Garcetti*. One of the overarching contradictions in the decision is that, although government employees are competent enough to be hired, they are just not competent enough to speak. They are, however, competent enough to engage in the vibrant dialogue of democracy so long as they do not do it while on the job, excluding matters of health, safety, and ethics. This vision of employee incompetence is clearly articulated by the majority's notion that government employee speech can be controlled because the government employer "commissioned or created" it.<sup>161</sup> In addition to the majority's flawed reading of precedent to support such a rule of law,<sup>162</sup> there seems to be a lack of understanding of who actually

---

157. See generally JUSTICE IN THE WORKPLACE: APPROACHING FAIRNESS IN HUMAN RESOURCE MANAGEMENT (Russell Cropanzano ed., 1993).

158. Ray, *supra* note 130, at 221–23.

159. Laura Krugman Ray, *Judging the Justices: A Supreme Court Performance Review*, 76 TEMP. L. REV. 209, 216 (2003).

160. See Maatman, *supra* note 90, at 8.

161. *Garcetti v. Ceballos*, 547 U.S. 410, 422 (2006).

162. The majority's proposition rested on the tenuous analysis of *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995). The *Rosenberger* principle holds that when government appropriates money for a policy, the speaker who receives the appropriation must hew to that policy. *Garcetti*, 547 U.S. at 435–38 (Souter, J., dissenting). Appropriations would appear to be substantively distinct from salaries.

pays for that speech. It seems rather obtuse to suggest that any government supervisor—many of whom are political appointees—is the only commissioner or creator of government speech without some consideration of the taxpayers who actually pay for it and to whom the government employee owes service. Furthermore, the majority’s attack on employee incompetence eliminated the protection of the First Amendment for government employees in terms similar to those found in student speech cases. However, after *Garcetti*, schoolchildren have more First Amendment speech rights than government employees because school administrators can only exercise “editorial control over the style and content of student speech in school-sponsored expressive activities *so long as their actions are reasonably related to legitimate pedagogical concerns*.”<sup>163</sup> Government supervisors have no similar constraints. Scraping past the surface of the pseudocommunication reveals little legal substance and less legal authority.

*Garcetti* essentially holds that government employees can be *punished* without regard to style or content of speech and the employer need not have any rational reason for the punishment. This ostensible rule of law is justified because “[r]estricting speech that owes its existence to a public employee’s professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen.”<sup>164</sup> Except, of course, the First Amendment protects citizens from the power of the State. Before *Garcetti*, government employees, unlike private citizens, had a constant relationship to the State, and constitutional measures protected that constant relationship in balancing the rights of the individual against the State. For instance, many government employees possess due process rights in their jobs whereas private citizens do not.<sup>165</sup> The *Garcetti* decision now inexplicably requires there be some relevant constitutional analogue to *private* citizens who do *not* work for the government in order for the First Amendment to apply to government employees.<sup>166</sup>

---

163. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (emphasis added).

164. *Garcetti*, 547 U.S. at 422 (majority opinion).

165. See, e.g., *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538–39 (1985); see also Cynthia Estlund, *Free Speech Rights that Work at Work: From the First Amendment to Due Process*, 54 UCLA L. REV. 1463, 1464 (2007).

166. *Garcetti*, 547 U.S. at 423. It would seem more fitting for the private sector to look to the public sector to protect its employees rather than the other way around.

The crux of this whole authoritarian political narrative is that government employees are no longer “citizens.” Up until this time, the government employee’s job status and duties were never at issue in First Amendment jurisprudence.<sup>167</sup> No analysis of the Court’s precedents would even hint at such a dichotomy. Instead, the focus had always been on the speech and whether it was disruptive or not.<sup>168</sup> Yet the absence of precedent did not stop the majority: through pseudocommunication it erected a bogeyman—that the First Amendment does not invest public employees with the right to “constitutionalize the employee grievance”—rather than analyzing a legal justification for off government employee speech.<sup>169</sup> Quoting from *Connick v. Myers*, the majority extrapolated employee *grievances* as being *any speech* uttered by government employees while doing their jobs. The “legal” principle by which the majority supports that proposition is that government employees have no “right to perform their jobs however they see fit,”<sup>170</sup> the irony of which is that Ceballos was doing his job correctly and as directed by his supervisors!

The community voice in *Garcetti* tried a tone of reasonableness to hide the fact that there was no legal precedent and, therefore, no legal analysis to support this stripping of First Amendment rights. Instead, the political narrative is fairly apparent—in its patronizing, authoritarian air and its fallacious “legal” arguments—the Court intended to elevate bad government managers while demonizing the government employee. It is ironic that the young law clerk to the Supreme Court who drafted the decision was (and perhaps still is) a government employee. It is ironic that the Court, all government employees, actually believe they are in the corporate granfalloon.

This authoritarian pseudocommunication is essentially an exhortation to submit to higher authorities because they are established and “legitimate.” Their legitimacy, of course, depends solely on the political narrative adopted by the Court majority in *Garcetti*, which emphasizes that some groups of people are not equal to others. Concomitantly, the holding serves the purpose of reining in freedom of speech. By couching this narrative in terms familiar to the legal profession, the majority assures itself that it is speaking in a

---

167. *Id.* at 427 (Stevens, J., dissenting).

168. *See* Nahmod, *supra* note 87, at 573–77.

169. *Garcetti*, 547 U.S. at 420 (quoting *Connick v. Myers*, 461 U.S. 137, 154 (1983)).

170. *Id.* at 422.

community voice to the legal audience. Instead, the rhetoric employed by the majority constrains the identification of that community to a small sector of the legal profession, other authoritarians, and the corporate “public” audience.

#### VII. THE SYMBOLIC VOICE

The Court, of course, has a purpose in legitimizing its rhetoric in *Garcetti*. If legal rhetoric creates a community of shared language,<sup>171</sup> then the goal of a particular political group in the legal community can use judicial rhetoric to create new communal and cultural references. This new “shared language”<sup>172</sup> then establishes the language of succeeding cases and changes the judicial rhetoric in any particular area of law. Specific language choices of the Court majority in *Garcetti* are peculiar to a legal cultural subset rather than to the legal community at large, especially words that have symbolic meaning to a politically conservative community that is predisposed to authoritarianism. Such reliance on symbols significantly alters the Court’s role from rhetorically persuading society to embrace certain values for the good of the community to symbol-maker persuading the audience to follow because of the ritual observance of symbols important to the community.<sup>173</sup> The problem for the Court is its embrace of symbols that are *not* for the good of the community.

Symbols make pseudocommunication succeed: the sender analyzes the Universe with certainty and reduces that analysis to a simple word, phrase, or slogan. Thus, symbols that are important to a specific political community are particularly appealing. These symbols may be words and ideas with specific meanings for the particular subgroup—like a secret code, password or handshake—although they have no legal credibility in the legal community at large. They are iconic of the subgroup’s political message with no legal significance but for their use in a judicial opinion, by which they are “sold” as symbols of the legal community at large. Their presence in a majority decision of the Supreme Court is therefore disquieting because the majority is attempting to make these aberrant words mainstream symbols regardless of whether they are

---

171. WHITE, *supra* note 121, at 33–35.

172. *Id.* at 172.

173. Marie A. Failing, *Against Idols: The Court as a Symbol-Making or Rhetorical Institution*, 8 U. PA. J. CONST. L. 367, 371–72 (2006).

appropriate in the legal context. But the importance of the symbols is crucial for the success of the Court's authoritarianism.

Symbols unite the membership of a political subgroup. Indeed, authoritarians are "suckers for slogans and sayings."<sup>174</sup> If the authoritarian worldview is that some groups are more worthy than others, then this group wants to be the most worthy, united by a common understanding and sense of belonging. Consequently, these symbols become shibboleths, or passwords: their words have specific meanings accorded them by this subgroup, meanings that might otherwise be unknown to everyone else.<sup>175</sup> The idea of "belonging" is implied in the word: "[T]he shibboleth is known only to those in the In Crowd."<sup>176</sup> Shibboleths in current parlance might include "compassion for Democrats" and "balanced budget for Republicans."<sup>177</sup> Shibboleths are particularly apt for the authoritarians because, as one rather jaded observer has noted, "the vast majority of men, and almost all women, are swayed by rhetoric rather than by logic, by the emotions more than by the intellect."<sup>178</sup>

Shibboleths in the control of a particular ideology can also take on the weight of ideographs. Ideographs can be used as a form of social control—words whose very use insists on some form of social conformity, even to persuasive effect on an entire community.<sup>179</sup>

---

174. ALTEMEYER, *supra* note 30, at 99.

175. "Shibboleth" means: "1. A word or pronunciation that distinguishes people of one group or class from those of another. 2a. A word or phrase identified with a particular group or cause; a catchword. b. A commonplace saying or idea. 3. A custom or practice that betrays one as an outsider." AMERICAN HERITAGE DICTIONARY (4th ed. 2006), *available at* <http://www.bartleby.com/61/11/S0341100.html>. "Originally denoting a word or phrase whose use betokens membership in a select group, it has lived to see its once-distinctive meaning eroded by time and misuse. Today a shibboleth is a slogan or catchphrase of any type, even sometimes . . . little more than a tenet or credo." David Franklin, *Slogans & Shibboleths*, 1 GREEN BAG 2D 195, 195 (1998).

176. Franklin, *supra* note 175, at 196–97.

177. *Id.* at 197.

178. WILLIAM SAMUEL LILLY, ON SHIBBOLETHS 1 (Chapman & Hall 1892).

Few are capable of following—to say nothing of judging—a sustained argument. But an apt phrase convinces the dullest with singular persuasiveness. And, in some cases, it becomes a Shibboleth, the faculty of effectively pronouncing which is a key to popular favor. It is easy to gibe at this mode of leading men by the ears. It is more philosophical to remember that as precedents are the application or misapplication of principles, so Shibboleths are the application or misapplication of syllogisms.

*Id.* at 2.

179. Michael Calvin McGee, *The "Ideograph": A Link Between Rhetoric and Ideology*, 66 Q. J. SPEECH 1, 6 (1980).

Often these words have intrinsic force in and of themselves without regard to their use as an argumentative proposition. Words such as “liberty,” “property” and “rule of law” are ideographs because they are “the basic structural elements, the building blocks, of ideology.”<sup>180</sup> Rather than standing for a unique proposition, an ideograph encompasses the spectrum of the series of meanings by which the term can be used.<sup>181</sup> Ideographs exist as symbols of discourse, but they also become integral to the political consciousness of the people who use them.<sup>182</sup> Ideographs can unite within a group but can also create divisions between groups:

[T]here are special interests within the United States separated one from the other precisely by disagreements regarding the identity, legitimacy or definition of ideographs. So we are divided by usages into subgroups: Business and labor, Democrats and Republicans, Yankees and Southerners are *united* by the ideographs that represent the political entity “United States” and *separated* by a disagreement as to the practical meaning of such ideographs.<sup>183</sup>

The meaning of an ideograph might evolve over time although its categorical meaning remains as “a constant reference to its history as an ideograph.”<sup>184</sup> Thus, the ideographs “liberty” and “equality” might expand or contract historically; however, the common denominator of each as the most descriptive term for the moment remains, not unlike the historical narrative of a rule of law.<sup>185</sup>

180. *Id.* at 6–7.

181. Ideographs are one-term sums of an orientation, the species of “God” or “Ultimate” term that will be used to symbolize the line of argument the meanest sort of individual *would* pursue, if that individual had the dialectical skills of philosophers, as a defense of a personal stake in and commitment to the society. Nor is one permitted to question the fundamental logic of ideographs: everyone is conditioned to think of “the rule of law” as a *logical* commitment just as one is taught to think that “186,000 miles per second” is an accurate empirical description of the speed of light even though few can work the experiments or do the mathematics to prove it. *Id.*

182. *Id.* “With regard to political union and separation, such vocabularies would consist of ideographs. Such usages as ‘liberty’ define a collectivity, i.e., the outer parameters of a society, because such terms either do not exist in other societies or do not have precisely similar meanings.” *Id.* at 8. “In practice, . . . ideology is a political language composed of slogan-like terms signifying collective commitment.” *Id.* at 15.

183. *Id.* at 8.

184. *Id.* at 10.

185. *Id.*



In practice, the rhetorical force of ideographs seems structured horizontally in the context of other ideographs.<sup>186</sup> However, when ideographs are required to “do work”<sup>187</sup> in an ideological conflict, their meanings might change. For example, a community may have a fairly clear categorical—if not historically vertical—understanding of the consonance of the ideographs “principle of confidentiality” and “rule of law.” However, their meanings are challenged by putting them in opposition to each other as when Richard M. Nixon relied upon the “principle of confidentiality” to ignore the “rule of law.”<sup>188</sup> Or, “[a]n ideological argument could result simply from multiple usages of an ideograph.”<sup>189</sup> Thus, “when we engage ideological argument, when we cause ideographs to *do work* in explaining, justifying, or guiding policy in specific situations, the relationship of ideographs changes.”<sup>190</sup> It was in this manner that the Court’s shibboleths were tested.

In *Garcetti*, the Court was faced with the ideograph “freedom of speech.” It is an ideograph with a pretty homogeneous meaning, both chronologically and categorically, arising from the protections offered by the Founders against the power of the government. However, *Garcetti* juxtaposed against that ideograph such phrases as “managerial discretion” and “managerial discipline.” These two phrases are shibboleths of business interests like the Chamber of Commerce rather than ideographs like “freedom of speech” or “patriotism.” Clearly, not ideographs of democratic values nor of the proportion of “freedom of speech,” the majority of the Court not only elevated “managerial discretion” to ideograph status, but in a head-to-head confrontation with “freedom of speech,” managerial discretion prevailed.

---

186. *Id.* at 12.

187. *Id.* at 13.

188. *Id.* at 12–13.

189. *Id.* at 14.

Each member of the community is socialized, conditioned, to the vocabulary of ideographs as a prerequisite for ‘belonging’ to the society. A degree of tolerance is usual, but people are expected to understand ideographs within a range of usage thought to be acceptable: The society will inflict penalties on those who use ideographs in heretical ways and on those who refuse to respond appropriately to claims on their behavior warranted through the agency of ideographs.

*Id.* at 15–16.

190. *Id.* at 13.

The Court's use of such rhetorical devices differs little from its use of iconic rhetorical devices to persuade the reader of the legitimacy of an opinion. For example, the Court often uses nonbinding sources—such as John Stuart Mill's *On Liberty*, or Blackstone's *Commentaries*<sup>191</sup>—in order to create a foundation of legitimacy for a decision. There is, however, a distinction to the legitimacy of the shibboleths as ideographs that the *Garcetti* majority used: when the Court relies on John Stuart Mill for a tactical, persuasive purpose, it is surely relying on a source of significantly more universal importance than a shibboleth arising from the corporate interests that coined the phrase “managerial discretion.”<sup>192</sup>

To the extent that the Court has elevated “managerial discretion” now to be an ideograph, it is more like Orwell's “meaningless words,” words that can arouse positive feelings but can have a private definition held by the author. Words like “democracy,” “socialism,” “freedom,” and “patriotic” are “often used in a consciously dishonest way. That is, the person who uses them has his own private definition, but allows his hearer to think he means something quite different.”<sup>193</sup> The use of these words in political writing is imitative and conforms to some kind of orthodoxy.<sup>194</sup> This is Orwell's “duckspeak” in 1984,<sup>195</sup> where ideographic words have no meaning at all. Such words can be dropped into a speech or a tract, and they will garner a “signal” reaction without any thought to their meaning whatsoever, with

191. Robert L. Hume, *The Use of Rhetorical Sources by the U.S. Supreme Court*, 40 L. & SOC'Y REV. 817, 817–18 (2006).

192. This elevation of shibboleth to meaningless ideograph has similar symbolic value as the use of iconography in government, such as eagles, standards, helmets, belts, boots, and flags. See, e.g., STEVEN BACH, *LENI: THE LIFE AND WORK OF LENI RIEFENSTAHL* 134–35 (2007).

193. Fischer, *supra* note 22, at 146–47 (using the USA PATRIOT Act to illustrate the meaninglessness of the word “patriot” in an act that essentially curtails substantial civil liberties); George Orwell, *Politics and English Language*, in *SHOOTING AN ELEPHANT AND OTHER ESSAYS* 83 (Harcourt, Brace & World, Inc. 1950).

194. Orwell, *supra* note 193, at 87.

A speaker who uses that kind of phraseology has gone some distance towards turning himself into a machine. The appropriate noises are coming out of his larynx, but his brain is not involved as it would be if he were choosing his words for himself. . . . And this reduced state of consciousness, if not indispensable, is at any rate favorable to political conformity.

*Id.*

195. WILLIAM LUTZ, *THE NEW DOUBLESPEAK: WHY NO ONE KNOWS WHAT ANYONE'S SAYING ANYMORE* 55 (1996); ORWELL, 1984, *supra* note 20, at 54.

“[n]o need for logic or reason, or any kind of thought.”<sup>196</sup> More so the harm when they are ideographs of limited pedigree and even more limited legal usage, such as “managerial discretion,” now given the imprimatur of the Supreme Court to achieve actual ideographic status.

The majority opinion also mau-maued the ideograph “citizen” and so warped its meaning as to make it virtually unrecognizable and usable in only limited senses. In effect, government employees are no longer citizens when they are on the job. Therefore, they are no longer entitled to constitutional protections. There is nothing in precedent that would suggest a large segment of the population with a constant relationship with the government would have the intrinsic value of citizenship stripped from them. This newly formed distinction is made whole cloth from meaningless language employed by the majority. To suggest that a government employee can be punished for speaking out about government corruption while she is doing her job is to hew too closely to the authoritarian notion of fear and conformity as well as the corporate world where employees can be kept in their place by threats of at-will dismissal.<sup>197</sup> The adoption of corporate ideographs into legal analysis was clearly intentional to obfuscate the fact that there is no legal grounding for this result as well as to create precedential value for their continued use.

Then there is the majority’s nearly nonsensical and clearly gratuitous insertion of the ideographic shibboleths “federalism” and “separation of powers” in the context of asserting that the judiciary should not insert itself between the government employer and its employees. Thus, the Court suggests that, when an employee is simply doing his official duties, the delicate balancing required of the First Amendment cases is unnecessary: “To hold otherwise would be to demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of *federalism* and the *separation of powers*.”<sup>198</sup> But what is the legal significance of these words: What is the relevance of “separation of powers” if all three branches are government

---

196. LUTZ, *supra* note 195, at 54–56.

197. See, e.g., BRUCE BARRY, SPEECHLESS: THE EROSION OF FREE EXPRESSION IN THE AMERICAN WORKPLACE (2007); STEVEN GREENHOUSE, THE BIG SQUEEZE: TOUGH TIMES FOR THE AMERICAN WORKER (2008).

198. *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006) (emphasis added).

employers? Are not members of the judiciary as well as their law clerks actually employees of the government? And depending upon which meaning of “federalism” is being employed here, is there a distinction between State as employer and Nation as employer? This nonsensical use of iconic phrases has no legal function in *Garcetti* but is useful in establishing their precedential value as ideographs for later cases.

*Garcetti* delivers a paean to the virtues of corporate management and its inherent superiority over government and especially government employees in passages rife with symbols and ideographs.<sup>199</sup> The Court has raised the political symbols of “managerial discipline” and “managerial discretion” to greater stature than “freedom of speech,” reflecting the authoritarian’s fear of such freedoms. Through the use of pseudocommunication, the Court’s authoritarian members have successfully engaged with and humbled the ideograph of “freedom of speech.”<sup>200</sup>

#### VIII. THE EMPTY VOICE

Last but not least, the Court majority employed empty rhetoric in pursuit of its authoritarian mission. Pseudocommunication is the essence of cant.<sup>201</sup> Cant is more than one form of distorted language and covers all that is implied in “monotonous, mechanical

---

199. For example:

Our holding likewise is supported by the emphasis of our precedents on affording government employers sufficient discretion to manage their operations. Employers have heightened interests in controlling speech made by an employee in his or her professional capacity. Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees’ official communications are accurate, demonstrate sound judgment, and promote the employer’s mission.

*Id.* at 422–23. This passage would make sense if Ceballos’ superiors had not already vetted the memo or that Ceballos was not actually doing his job.

200. For a similar discussion on the inconsistent use of ideographs, see Theodore O. Prosser & Craig R. Smith, *The Supreme Court’s Ruling in Bush v. Gore: A Rhetoric of Inconsistency*, 4 RHETORIC & PUB. AFF. 605 (2001).

201. Cant has been defined as:

1. Monotonous talk filled with platitudes. 2. Hypocritically pious language. 3. The special vocabulary peculiar to the members of an underworld group; argot . . . 5. Whining speech, such as that used by beggars. 6. The special terminology understood among the members of a profession, discipline, or class but obscure to the general population; jargon.

AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 273 (4th ed. 2006), available at [http://dictionary2.classic.reference.com/browse/Canting\\*ly](http://dictionary2.classic.reference.com/browse/Canting*ly).

speech.”<sup>202</sup> Cant “discourage[s] clear thought, create[s] doublethink and falsehood, prevent[s] our seeing the world as it is, and in important ways diminish[es] our humanity.”<sup>203</sup> Cant is a primary resource for *Garcetti*’s majority to subvert the legal specialized language into an instrument of authoritarian doublespeak.

Doublespeak is the philosophical handmaiden to pseudo-communication. Doublespeak controls messages, particularly political messages, in a way designed to convince larger and larger audiences to accept unpalatable positions.

Doublespeak is language that pretends to communicate but really doesn’t. It is language that makes the bad seem good, the negative appear positive, the unpleasant appear attractive or at least tolerable. Doublespeak is language that avoids or shifts responsibility, language that is at variance with its real or purported meaning. It is language that conceals or prevents thought; rather than extending thought, doublespeak limits it.

Doublespeak is not a matter of subjects and verbs agreeing; it is a matter of words and facts agreeing. Basic to doublespeak is incongruity, the incongruity between what is said or left unsaid, and what really is. It is the incongruity between the word and the referent, between seems and be, between the essential function of language—communication—and what doublespeak does: mislead, distort, deceive, inflate, circumvent, obfuscate.<sup>204</sup>

Often filled with “empty language”—such as “silent majority” and “death tax”—doublespeak is used to say one thing while meaning the opposite.<sup>205</sup> Such devices especially trade “in the rhetoric of fear in order to manipulate the public into [a] state of servile political dependency and unquestioning ideological

---

202. A.M. Tibbetts, *A Case of Confusion: The NCTE Committee on Public Doublespeak*, 40 C. ENG. 407, 410 (Dec. 1978).

203. *Id.*

204. LUTZ, *supra* note 195, at 4.

205. Giroux, *supra* note 42, at 111–12. The use of doublespeak in its specialized form of Newspeak is on the rise in the United States and produces “an impoverished vocabulary, and an elementary syntax . . . to limit the instruments for complex and critical reasoning.” *Id.* at 110 (citation omitted). In the past few years, “the tools of language, sound, and image are increasingly being appropriated in an effort to diminish the capacity of the American public to think critically.” *Id.*

support.”<sup>206</sup> The most obvious purpose for the Court to use doublespeak in *Garcetti* is to diminish civil rights.<sup>207</sup>

Doublespeak is essentially euphemistic although four distinct categories of doublespeak have been identified: euphemism, jargon, gobbledygook (bureaucratese), and inflated language.<sup>208</sup> Doublespeak is therefore not the prerogative of any particular political persuasion. The most easily identifiable doublespeak in *Garcetti* is from the first category—euphemism—as the Court majority attempted to supplant hitherto accepted jargon (legalese) with other words that mean something quite different. However, the majority was also not above using gobbledygook and inflated language to reach its result.

The first form of doublespeak in *Garcetti* is the use of gobbledygook, or bureaucratese. Gobbledygook is incomprehensible language, coined by Washington, D.C. officialdom.<sup>209</sup> Officials employ gobbledygook to avoid angering the electorate, and it is often laced with language larded by respectability and authority. Using gobbledygook, one vice-presidential candidate assured the electorate that the United States needed to support the “Star Wars”

---

206. *Id.* at 111. The use of doublespeak by administrative agencies has even prompted legal inquiries into their use of federal funds to propagate executive branch propaganda. *See, e.g.,* Kevin R. Kosar, *The Law: The Executive Branch and Propaganda: The Limits of Legal Restrictions*, 35 PRESIDENTIAL STUD. Q. 784 (2005); *see also* Cheryl L. Wade, “We Are an Equal Opportunity Employer”: *Diversity Doublespeak*, 61 WASH. & LEE L. REV. 1541 (2004) (analyzing the use of doublespeak by corporations to divert attention from their failure to attend to discrimination and racism in the workplace).

207. William Lutz notes:

The clearest possible language is essential for democracy to function, for it is only through clear language that we have any hope of defining, debating, and deciding the issues of public policy that confront us. The corruption of public language—the language we use to discuss public affairs and to decide public policy—is the corruption of democracy. Doublespeak in public discourse does not help us develop, preserve, and advance our culture, our society, our nation. Doublespeak breeds cynicism, distrust, and, ultimately, hostility, the very qualities that undermine and destroy democracy.

LUTZ, *supra* note 195, at 24–25.

208. WILLIAM LUTZ, DOUBLESPEAK: FROM “REVENUE ENHANCEMENT” TO “TERMINAL LIVING”: HOW GOVERNMENT, BUSINESS, ADVERTISERS, AND OTHERS USE LANGUAGE TO DECEIVE YOU 2–6 (1989); *see also* KEITH ALLEN & KATE BURRIDGE, EUPHEMISM & DYSPEMISM: LANGUAGE USED AS SHIELD AND WEAPON 201–04 (1991) (noting that jargon and gobbledygook/bureaucratese sometimes intersect with euphemism).

209. ALLEN & BURRIDGE, *supra* note 208, at 196; LUTZ, *supra* note 208, at 5. Interestingly, the very term “gobbledygook” was itself coined by U.S. Representative Maury Maverick in 1944. JOHN B. BREMNER, WORDS ON WORDS 177 (1980).

strategic-defense initiative with the following: “Why wouldn’t an enhanced deterrent, a more stable peace, a better prospect to denying the ones who enter conflict in the first place to have a reduction of offensive systems and an introduction to defensive capability?”<sup>210</sup>

The Court majority used gobbledygook in such gems as: “To hold otherwise would be to demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers”; and “Ceballos’ proposed contrary rule . . . would commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business,” characterizing such rule as “displacement of managerial discretion by judicial supervision.”<sup>211</sup> Interspersed with legalese, these bits of fluff are intended to appeal to the legal audience without saying anything legal. The Court is couching in gobbledygook the “principle” that courts are not competent anymore to judge speech issues between government employers and employees. Derived from no legal principle from the *Pickering-Connick* historical continuity, this bureaucratese appeals to a small slice of political audience while its gobbledygook is intended to assuage the fears of the remainder of the audience that there really exists some legal rationale.<sup>212</sup>

Of course, the most extraordinary use of gobbledygook is the majority’s evisceration of “citizen.” Although it is hard to categorize this procedure as bureaucratese, one is otherwise hard-pressed to discover the source of the corruption of that word. It now no longer means “in a political sense, to designate one who has the rights and privileges of a citizen of a state or of the United States.”<sup>213</sup> The

---

210. LUTZ, *supra* note 208, at 5. Bureaucratese also shares, with shibboleths, the ability to elevate the status of the speaker with the In-Crowd. See ALLEN & BURRIDGE, *supra* note 208, at 206.

211. *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006).

212. Lest one should think that bureaucratese is the sole bailiwick of the conservative persuasion, a Justice Breyer majority opinion was recently taken to task for creating a standard of review that consisted of gobbledygook. See *Metro. Life Ins. Co. v. Glenn*, 128 S.Ct. 2343, 2358 n.3 (2008) (Scalia, J., dissenting).

213. *Baldwin v. Franks*, 120 U.S. 678, 690 (1887). “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” U.S. CONST. amend. XIV. See also *Afroyim v. Rusk*, 387

Court now excludes public employees who are doing their jobs from citizenry and therefore from the First Amendment's protection from the government, the very entity against whom the Bill of Rights was intended to protect. This odd "disjunctive" treatment leaves up in the air exactly when government employees are citizens and when they are not: when they are serving their government and other citizens they are not citizens, but when they are not, they can speak. This obfuscation of "citizen" obscures the Court's shift away from the threshold inquiry about the speech itself: a matter of public concern or a matter of personal interest only.<sup>214</sup> Instead, the focus is on the nebulous job description given by the *employer* to define whether an employee is a citizen or not. Defining free speech is now in the hands of the government, against whom the First Amendment was designed to protect citizens. Only bureaucratise could make that palatable.

The second form of doublespeak used in the majority opinion is inflated language, making the "ordinary seem extraordinary."<sup>215</sup> Inflated language is the bureaucratic equivalent of the fast-food industry, thereby elevating the mundane to higher status.<sup>216</sup> Hence, a used car is a "pre-owned" car; when the United States attacks first—a "preemptive strike"; a lay-off of workers—"a career alternative enhancement program."<sup>217</sup> Thus, when the Court says "managerial discretion,"<sup>218</sup> it is inflating language to characterize the right of government supervisors to retaliate against employees doing their jobs.

"Managerial discretion"<sup>219</sup> in particular has been inflated, apparently co-opted from the jargon of the corporate world that the majority seems to want to emulate. The Court has now elevated it to

---

U.S. 253, 268 (1967) ("Citizenship in this Nation is a part of a cooperative affair. Its citizenry is the country and the country is its citizenry.").

214. Nahmod, *supra* note 87, at 573–76.

215. LUTZ, *supra* note 208, at 6–7.

216. See ALLEN & BURRIDGE, *supra* note 208, at 206. In legalese, it is called puffery. See, e.g., Holder v. Hall, 512 U.S. 874, 939 (1994) (Thomas, J., concurring) (accusing the Court of engaging in puffery).

217. LUTZ, *supra* note 208, at 6.

218. Garcetti v. Ceballos, 547 U.S. 410, 423 (2006).

219. "Managerial discretion" is a malleable term, previously having been used by the Court to characterize lawful business activities, such as voluntary affirmative action hiring policies, see, e.g., Local No. 93, Int'l Ass'n. of Firefighters v. Cleveland, 478 U.S. 501, 519–21 n.10 (1986), or to classify individuals as managers under the National Labor Relations Act, NLRB v. Bell Aerospace Co., 416 U.S. 267, 303 (1974) (White, J., dissenting in part).



some sort of sacrosanct legal status. However, “managerial discretion” in the corporate community itself has different meanings. It can mean corporate managers’ micro-management of corporate affairs, measured by the intersection of the corporate structure and the managers’ “rational responses to them that creates the zone of discretion.”<sup>220</sup> It also has a more macro-management meaning by which corporate managers are invested “with a great deal of authority to pursue business strategies through diverse means, subject to a few important constraints.”<sup>221</sup> Or the Court is simply inflating the private sector’s view of employer discretion to that of the government workplace, on parity with the First Amendment.<sup>222</sup> Ironically, the corporate world views law as one of the important constraints on managerial discretion,<sup>223</sup> especially because business decision makers are rational perhaps only twenty percent of the time.<sup>224</sup> By *Garcetti*, however, the Court has specifically abdicated the constraint of law from “managerial discretion” in the interests of the “latitude of managerial action.”<sup>225</sup> Inflated language has thus turned the intent of “managerial discretion” on its head.

Similarly did the majority puff up “managerial discipline”<sup>226</sup> as a euphemism for the retaliatory act itself. And this third category of doublespeak—euphemism—is where the Court outdid itself. What must first be understood about the Court’s euphemisms is their relationship to legalese, and as jargon, the fourth type of

---

220. Susan Key, *Perceived managerial discretion: an analysis of individual ethical intentions*, 14 J. MANAGERIAL ISSUES 218, 219 (2002), available at [www.entrepreneur.com/tradejournals/article/90118307\\_1.html](http://www.entrepreneur.com/tradejournals/article/90118307_1.html).

221. Michael Abramowicz & M. Todd Henderson, *Prediction Markets for Corporate Governance*, 82 NOTRE DAME L. REV. 1343, 1387 (2007); Leo E. Strine, Jr., *Toward a True Corporate Republic: A Traditionalist Response to Bebchuk’s Solution for Improving Corporate America*, 119 HARV. L. REV. 1759, 1762–64 (2006).

222. BARRY, *supra* note 197, at 5 (“Our legal system gives employers a great deal of discretion to manage the workplace, including employee speech, as they see fit and imposes few limits on how that discretion is exercised.”).

223. *E.g.*, Strine, *supra* note 221, at 1762–64.

224. James E. Holloway, *A Primer on the Theory, Practice, and Pedagogy Underpinning a School of Thought on Law and Business*, 38 U. MICH. J.L. REFORM 587, 599–600 n.45 (2005) (citing RICKY W. GRIFFIN, *MANAGEMENT* 274 (6th ed. 1999)).

225. *Id.* at 590 n.15 (citing Donald C. Hambrick & Sydney Finkelstein, *Managerial Discretion: A Bridge Between Polar Views of Organizational Outcomes*, in *RESEARCH IN ORGANIZATIONAL BEHAVIOR: AN ANNUAL SERIES OF ANALYTICAL ESSAYS AND CRITICAL REVIEWS* 371, 371 (L.L. Cummings & Barry M. Staw eds., 1987)).

226. *Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006).

doublespeak.<sup>227</sup> To the extent the legal audience agrees on and employs terms consistently, jargon is a legitimate use of language.<sup>228</sup> The specialized language of the law sometimes is the only accurate language available because the precision of the words chosen requires technical language known by and familiar to the profession.<sup>229</sup> Euphemistic jargon as legalese provides perfect cover for the Court to misuse language under the guise of introducing new technical terminology to be adopted by the profession. Unfortunately, these new “technical” terms are euphemisms in the more Orwellian sense than in the legal sense.

Euphemisms are a healthy way for individuals to avoid taboo subjects, such as sex, death, and disease,<sup>230</sup> but are doublespeak when “used to mislead or deceive.”<sup>231</sup> As Orwell suggested, it “is designed to make lies sound truthful and murder respectable.”<sup>232</sup> Hence, Nazi Germany’s genocide was a “final solution” and “special treatment,”<sup>233</sup> and “[c]apital punishment is our society’s recognition of the sanctity of human life.”<sup>234</sup> Likewise did the majority employ euphemisms to hide the fact that its decision was based not on any principled reasoning but upon the desire to protect retaliatory behavior by bad managers.

Perhaps most suggestive of this effort is the opinion’s euphemistic use of “discipline.” “Discipline” means “[p]unishment intended to correct or instruct; esp., a sanction or penalty imposed after an official finding of misconduct.”<sup>235</sup> In like fashion, the Court has interpreted “discipline” in the context of a union’s right to discipline its members’ rules violations as distinct from *retaliation*.<sup>236</sup>

---

227. See generally LUTZ, *supra* note 195, at 85–113.

228. LUTZ, *supra* note 208, at 4.

229. ALLEN & BURRIDGE, *supra* note 208, at 195–201.

230. *Id.* at 233–34. “A euphemism is used as an alternative to a dispreferred expression, in order to avoid possible loss of face: either one’s own face or, through giving offense, that of the audience, or of some third party.” *Id.* at 11. For instance, saying one has “passed away” is a euphemism for one has died. LUTZ, *supra* note 208, at 2; see generally ALLEN & BURRIDGE, *supra* note 208, at 153–71.

231. LUTZ, *supra* note 208, at 3; see generally ALLEN & BURRIDGE, *supra* note 208, at 168–69.

232. Orwell, *supra* note 193, at 92.

233. ALLEN & BURRIDGE, *supra* note 208, at 169.

234. LUTZ, *supra* note 208, at 9.

235. BLACK’S LAW DICTIONARY 496 (8th ed. 2004).

236. *Breininger v. Sheet Metal Workers Int’l Ass’n Local Union No. 6*, 493 U.S. 67, 92 n.16 (1989) (“We note only that Congress’ reference to punishments typically imposed by the

In *Garcetti*, however, “discipline” is a euphemism for employer retaliation. For instance, despite Ceballos having done his job correctly, the issue before the Court was “whether the First Amendment protects a government employee from *discipline* based on speech made pursuant to the employee’s official duties.”<sup>237</sup> Then, to make sure the audience understands that retaliation is now “discipline,” the opinion included the word in the holding of the case,<sup>238</sup> in the phrase “managerial discipline,”<sup>239</sup> and, lest anyone be confused, in closing.<sup>240</sup>

Similar euphemisms are used as if they were legal jargon rather than some amorphous business jargon with little legal significance, such as “corrective action,”<sup>241</sup> “employer control,”<sup>242</sup> and “evaluat[e].”<sup>243</sup> The Court’s use of euphemisms and its efforts to elevate them to legitimate legal jargon cannot hide the simple truth that the government employer in *Garcetti* was simply retaliating against a government employee<sup>244</sup> who was doing his job as expected by taxpayers.<sup>245</sup>

---

union as an entity through established procedures indicates that Congress meant ‘discipline’ to signify penalties applied by the union in its official capacity rather than ad hoc *retaliation* by individual union officers.” ) (emphasis added). This definition is aligned with that used by corporate human resources personnel:

The purpose of discipline is to encourage employees to behave sensibly at work, where ‘sensible’ behavior is defined as adhering to rules and regulations. In an organization, rules and regulations serve about the same purpose that laws do in society, and discipline is called for when one of these rules or regulations is violated.

GARY DESSLER, HUMAN RESOURCE MANAGEMENT 598–99 (6th ed., Prentice Hall 1994).

237. *Garcetti v. Ceballos*, 547 U.S. 410, 413 (2006) (emphasis added).

238. “We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer *discipline*.” *Id.* at 421 (emphasis added).

239. *Id.* at 424.

240. *Id.* at 426.

241. “If Ceballos’ superiors thought his memo was inflammatory or misguided, they had the authority to take proper corrective action.” *Id.* at 423.

242. “It simply reflects the exercise of employer control over what the employer itself has commissioned or created.” *Id.* at 422.

243. *Id.* (“The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating [read: *disciplining*] his performance.”).

244. Perhaps what the Court majority is also doing is making “government employee” a dysphemism. “A dysphemism is an expression with connotations that are offensive either about the denotatum or to the audience, or both, and it is substituted for a neutral or euphemistic expression for just that reason.” ALLEN & BURRIDGE, *supra* note 208, at 26.

Dysphemisms . . . are used in talking about one’s opponents, things one wishes to show disapproval of, and things one wishes to be seen to downgrade. They are

## IX. THE MOTIVE

Legal theorists have suggested that the Court's audience is a very narrow one, perhaps an audience that only encompasses its own members.<sup>246</sup> Similarly has it been suggested that the Court's part in the constitutional dialogue is a narrow one, with very little impact on policy, given the confluence of other, more powerful political forces in play.<sup>247</sup> However, increasingly in the past few years, the Court majority seems to want to be a bigger player in the policy game, not just the ratifier of other branches' actions. Hence, it drafts opinions like *Garcetti*, short on constitutional dialogue but long on policy ramifications that infect the entirety of the government employment system for reasons that are distinctly corporate and in some ways political—to deregulate the management of government *employers* as well as to protect them from accountability to the tax-paying citizens.

The past couple of decades have seen an increased interest in running government like corporations, hence the movement to privatize government operations. Unlike their private-sector counterparts, government employees enjoyed certain freedoms denied other employees, not the least of which was their First Amendment freedom of expression. In addition, as private-sector unions shrink in numbers and status, public employee unions remain major players in both protecting their members and in formulating policy. As corporate thinking infects the deliberations of the Court, so too do the harmful aspects of modern corporate governance necessarily infect its decisions. How the private sector treats its

---

therefore characteristic of political groups and cliques talking about their opponents; of feminists speaking about men; and also of larrikins and macho types speaking of women and effete behaviors.

*Id.* at 27. The effect of depriving public employees of their First Amendment rights when they are on task is to deprive them of their citizenship—to make them less than others. This patronizing position is apparent in the Court's treatment of the dependence of employee speech on the employer: "Restricting speech that *owes* its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the *exercise of employer control over what the employer itself has commissioned or created.*" *Ceballos*, 547 U.S. at 422 (emphasis added).

245. Contrast this result to the growing trend of protecting employees who are not doing their jobs because of matters of conscience. *See generally* James A. Sonne, *Firing Thoreau: Conscience and At-Will Employment*, 9 U. PA. J. LAB. & EMP. L. 235 (2007).

246. *See* Mark Tushnet, "Shut Up He Explained," 95 NW. U. L. REV. 907, 912–15 (2000).

247. *Id.*

employees must also be the way the public sector treats its employees.

This corporate thinking includes the protectiveness that many American employers feel toward their nearly unchallenged power over their workforce, power that was granted to them by current employment law.<sup>248</sup> Free expression in the workplace can challenge that power. Consequently, private employers embrace free expression in the workplace only when it is helpful in achieving “productivity, efficiency, and prosperity” for the company.<sup>249</sup> Otherwise, employees see any corporate encouragement to express themselves as pointless and perhaps dangerous.<sup>250</sup> Hence, the *Garcetti* opinion stands merely as a mirror of private corporate governance.

Related to the private sector, corporate culture that the Court seems willing to adopt for government employers is its desire to pay increasing homage to principles of the “free market.” Unfortunately, these principles have had a concomitant deleterious decrease in the economic and social position of the American worker. Any number of events could have been the pivotal point when the American worker’s prosperity took a nose-dive—deregulation, recessions, de-unionizing.<sup>251</sup> But as a consequence, the interests of the American worker were pitted against the interests of the American consumer, and the American worker lost.<sup>252</sup> So too went the fortunes of the American white-collar worker as it was pitted against the interests of the American shareholder in the 1990s.<sup>253</sup> Consequently, as the corporate model influences judicial decisions, it has a particular affect on how the courts will treat government employees, Ceballos being just one of many to fall victim to the fiction that government interests and corporate interests are the same.

One of the primary distinctions between corporations and government is that the government is not answerable to consumers or shareholders; it is answerable to citizens, thus making the free-market system of governance distinctly inapplicable to government. This is nowhere more apparent than Ceballos’ effort to serve the citizens he worked for while his supervisors served a different interest

---

248. BARRY, *supra* note 197, at 192.

249. *Id.* at 193–94.

250. *Id.* at 193.

251. GREENHOUSE, *supra* note 197, at 79–80.

252. *Id.* at 79–83.

253. *Id.* at 83–87.

in protecting potential wrongdoing in the Los Angeles County Sheriff's Department.

The immediate as well as long-range, perhaps unintended, purpose of *Garcetti* is to stifle whistleblowers, who are often government employees. "[W]histleblower speech may be defined as that which reveals that a government official has exceeded her authority in violation of the public trust,"<sup>254</sup> "exposing [that] official's fault to a third party or to the public."<sup>255</sup> One might quibble with the notion that Ceballos, a deputy district attorney, was acting as a whistleblower when he wrote his disposition memo that faulted the sheriff's department's investigation: alternatively, he might have been following his ethical obligations as an attorney or he might simply have been performing his minimum job description. The latter two circumstances, of course, widen the impact of the Court's new policy interpretation of employee speech. Nevertheless, the majority's rationale singled out whistleblower statutes as alternatives to the First Amendment speech protections.<sup>256</sup> But as Justice Souter pointed out, whistleblower statutes do not offer the comprehensive protection from employer retaliation such as Ceballos experienced sufficient to supplant the broader range of the First Amendment.<sup>257</sup> Even when the political will has coalesced to protect whistleblowers after *Garcetti*, it has been thwarted: Congress recently attempted to buttress the federal whistleblower protection for Department of Defense contractors' employees through the defense reauthorization in 2008,<sup>258</sup> but President George W. Bush

---

254. Rosalie Berger Levinson, *Silencing Government Employee Whistleblowers in the Name of "Efficiency,"* 23 OHIO N.U. L. REV. 17, 19 (1996).

255. *Garcetti v. Ceballos*, 547 U.S. 410, 439 (2006) (Souter, J., dissenting).

256. *Id.* at 425 (majority opinion). For some, like federal employees, the pertinent whistleblower act may preclude an employee from pursuing a First Amendment claim. Levinson, *supra* note 254, at 19 n.6.

257. *Garcetti*, 547 U.S. at 439 (Souter, J., dissenting). "[T]he combined variants of statutory whistle-blower definitions and protections add up to a patchwork, not a showing that worries may be remitted to legislatures for relief." *Id.* at 440. Furthermore, whistleblower statutes would not protect the speech of those government employees doing their job who are not engaged in whistle blowing. *Id.* Instead, the First Amendment has been the refuge for those whistleblowers whose respective jurisdictions' statutes do not provide protection. *E.g.*, Levinson, *supra* note 254, at 19–20.

258. 10 U.S.C. § 2409, *amended by* National Defense Authorization Act for the Fiscal Year 2008, H.R. 4986 § 846. Congress is still working on shoring up the Whistleblower Protection Act in the wake of *Garcetti* via the Senate's Federal Employee Protection of Disclosures Act, S. 274, 110th Cong. (2008) and the House's Whistleblower Protection

executed a signing statement, allowing the President to bypass this new amendment's provisions.<sup>259</sup>

Indeed, the events of the past six or seven years<sup>260</sup> have influenced the policy set out in *Garcetti*. *Garcetti* will clearly have a greater impact on the constitutional dialogue by protecting any administration—but particularly the George W. Bush administration—from innumerable instances of government employees either blowing the whistle on executive branch activities or even just engaging in official duties that anger government employers. The instances of such now-sanctioned retaliation are rather staggering:

- NASA management retaliated against two research pilots and an aviation manager after raising concerns about flight safety.<sup>261</sup>
- Military defense lawyers at Guantánamo have accused the government of trying to intimidate them in their defense of clients.<sup>262</sup>
- The Inspector General for the Department of Commerce retaliated against employees who assisted congressional investigations for misuse of funds.<sup>263</sup>
- An FDA Commissioner threatened whistleblowers.<sup>264</sup>
- Controversial U.S. Attorney appointments are being investigated.<sup>265</sup>

---

Enhancement Act, H.R. 985, 110th Cong. (2008). As of the date of this draft, both Acts remain pending.

259. John M. Donnelly, *White House Criticizes Defense Authorization Bill in Signing Statement*, CQ TODAY, Jan. 28, 2008, at 2008 WLNR 2019654; Charlie Savage, *Bush Asserts Authority to Bypass Defense Act*, BOSTON GLOBE, Jan. 30, 2008, at A1.

260. Although this Republican administration has elevated employee intimidation and retaliation to an art form, it is not unique in abusing whistleblowers. See, e.g., John S. Adams, *New Chief in Town*, MISSOULA INDEP., Feb. 22, 2007, at 2007 WLNR 4567028 (U.S. Forest Service officials); William F. Jasper, *9/11 Security Holes Remain*, NEW AMERICAN, Oct. 4, 2004, at 2004 WNLNR 5966441 (U.S. Customs officials).

261. David Lerman, *NASA Watchdog Won't Bow Out*, DAILY PRESS (Newport News, Va.), June 8, 2007, 2007 WLNR 10719984.

262. E.g., Michael Melia, *Military Lawyers Uneasy Defending Terror Suspects: Guantanamo Trials Spur Fears of Retribution*, S. FL. SUN-SENTINEL, Mar. 24, 2007, at 9A; *Guantanamo: Justice Shackled*, ECONOMIST, Mar. 31, 2007, at 2007 WLNR 5961036.

263. John Solomon, *Lawmakers Warn Watchdog*, WASH. POST, May 14, 2007, at 2007 WLNR 9114198; *Committee Opens Investigation into Allegations of Misconduct by Commerce Inspector General*, U.S. FED. NEWS, May 2, 2007, at 2007 WLNR 8357477.

264. *Von Eschenbach Faces Tough Questions from House Panel*, FDA WEEK, Mar. 23, 2007, at 2007 WLNR 5507297.

1545]

*Shibboleths and Ceballos*

- Department of Justice officials are allegedly impeding those investigations into the controversial U.S. Attorney appointments.<sup>266</sup>
- Federal Aviation Administration officials retaliated against safety inspectors for reporting airline safety violations.<sup>267</sup>
- National security officials have been retaliated against when: speaking out about prisoner abuses at Abu Ghraib; disclosing Department of Defense intelligence problems; reporting misconduct in F.B.I. counterintelligence; and complaining about nuclear security problems.<sup>268</sup>
- Private whistleblowers reporting corruption in the reconstruction of Iraq have been vilified, demoted and fired.<sup>269</sup>

These events evidence just the tip of the iceberg of what is known and has been known concerning government misconduct and employees who try to report it.<sup>270</sup>

Obviously, this ruling will affect future administrations as well, the immediate situations discussed above notwithstanding. It will also have an impact on all state and local governments and the service of those entities to their clients. The overarching goal of the

265. Michael Isikoff, *Fuel to the Firings*, NEWSWEEK, March 19, 2007, at 2007 WLNR 4676850.

266. *E.g.*, Kevin Diaz & Conrad Wilson, *Watchdog Agency Says Justice Blocking Paulose Investigation*, STAR-TRIBUNE (Minneapolis-St. Paul), Jan. 30, 2008, at 1B.

267. Stanley Holmes & Dean Foust, *Airline Safety: A Whistleblower's Tale*, BUS. WK., Feb. 11, 2008, at 48.

268. Michael Posner, *Whistleblowers Detail Retaliation for Criticizing Agencies*, CONGRESS DAILY, Feb. 15, 2006, at 2006 WLNR 2656044; *see also* Jamie Sasser, Comment, *Silenced Citizens: The Post-Garcetti Landscape for Public Sector Employees Working in National Security*, 41 U. RICH. L. REV. 759, 760–61 (2007) (opining that, of all federal employees, national security personnel will be most affected by the loss of First Amendment protections because arguably everything they do on the job is a matter of national security and thereby within their day-to-day official duties).

269. *E.g.*, Deborah Hastings, *Expose Contractor Fraud in Iraq, and You May Face Penalties*, SUNDAY GAZETTE-MAIL (Charleston, S.C.), Aug. 26, 2007, at 15A; *see also* James Glanz & Eric Schmitt, *U.S. Widens Fraud Inquiry into Iraq Military Supplies*, N.Y. TIMES, Aug. 28, 2007, at A1. It is ironic that the government supports private whistleblowers under certain circumstances while those who report misconduct in contracts for Iraqi reconstruction are treated badly. *See, e.g.*, Ameet Sachdev, *Sweet Sound of Settlement*, CHI. TRIB., Feb. 17, 2008, at 5(1).

270. Eighty-one percent of the respondents in a recent survey of public sector employees had observed government misconduct while on the job. The private sector rated little better at seventy-four percent. Ed Brock, *Public Sector Falls Short in Ethics Survey*, AM. CITY & COUNTY, Feb. 1, 2007, at 8.



*Garcetti* opinion on behalf of protecting government employers is sowing fear in government employees. Instilling fear is, unfortunately, a historical reality in the American workplace.<sup>271</sup> Being a whistleblower is hard enough with the laws as they existed before *Garcetti*: “To run up against the organization is to risk obliteration.”<sup>272</sup> Now government employees are being told that the government can retaliate against them with impunity even if they are not whistleblowers but are simply doing their jobs. “If employees in the public sector are intimidated by their superiors, or if their superiors retaliate against them for blowing the whistle[,] . . . they will be reluctant to voice the expert knowledge that might help avert disastrous courses of action pursued by the government.”<sup>273</sup>

#### X. CONCLUSION

Drafting an opinion from a political viewpoint is a legitimate exercise of the bully-pulpit. The members of the Supreme Court are selected by the party in charge of the executive branch at that moment, and the back-and-forth movement of the law often reflects those political differences. However, drafting an opinion in service to authoritarianism with little other legitimate rationale strikes at the heart of a democratic process. Pragmatic arguments for what the law should be take a back seat to reaching a preordained result that has little legitimacy beyond the stature of the Court.

The stature of the Court implicitly validates the use of pseudocommunication to reach such a preordained result: the power of the Court, as sender, controls the message with no opportunity for feedback. The Court’s control of the facts and analysis encourages the receiver to accept its conclusion at face value with little or no critical thinking, especially if the intended receiver is a member of the group that implicitly accepts the corporate language and symbolism used by the Court. This same group is susceptible to the emotional connections with the message and believes that the ends justify the means, especially if the interests of the “free market”

---

271. *E.g.*, COREY ROBIN, FEAR: THE HISTORY OF A POLITICAL IDEA 228–29 (Oxford U. Press 2004). Robin posits that one of the sources of that fear is that the American workplace has an overabundance of supervisors compared to other industrialized countries like Japan and Germany. *Id.* at 230–32.

272. C. FRED ALFORD, WHISTLEBLOWERS: BROKEN LIVES AND ORGANIZATIONAL POWER 4 (Cornell U. Press 2001).

273. ROBIN, *supra* note 271, at 230.

1545]

*Shibboleths and Ceballos*

are considered a higher authority than the interests of the government. The means used here by the Court was to change the factual and legal case it had before it to create instead a rhetorical fantasy, a fantasy where emotional appeals to the receiver replaced legal analysis and authoritarian shibboleths and symbols became a private and unknowable source of the law. These ingredients of pseudocommunication infected the *Garcetti* decision as if the Court thumbed its nose at the law and reached its result “because we can.”

